(31,376)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 653

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED, PETITIONERS,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEBRASKA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fols. a-1] **IN UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, OMAHA DIVISION**

Doc. 1554. No. —, Law

ELIZABETH F. SHUKERT and ISABEL C. SHUKERT, Executrices of the Estate of Gustave E. Shukert, Plaintiffs,

vs.

ARTHUR B. ALLEN, Collector of Internal Revenue, District of Nebraska, Defendant

PETITION—Filed February 26, 1924

Comes now the plaintiffs and for their cause of action against the defendant say:

1. That on September 29th, 1921 Gustave E. Shukert died testate at Omaha, Nebraska and that on October 29th, 1921 plaintiffs were appointed by the county court of Douglas County, Nebraska, executrices of the estate of said Gustave E. Shukert, deceased, and ever since plaintiffs have been and now are the duly appointed, qualified and acting executrices of said estate.

2. That the defendant Albert B. Allen on and prior to July 6th, 1922 was, and ever since has been and now is, the duly appointed, qualified and acting Collector of Internal Revenue for the district of Nebraska, at Omaha, Nebraska, under the laws of the United States of America.

3. That on July 6, 1922 these plaintiffs, as executrices of the estate of said Gustave E. Shukert, deceased, duly filed at Omaha, Nebraska, with the defendant, as Collector of Internal Revenue as aforesaid, their return of said estate, as executrices thereof, for federal estate tax, as required by the act of congress in that behalf, said return being filed on form 706 of the treasury [fol. 2] department, United States Internal Revenue Department, said blank form being furnished to these plaintiffs by said defendant; that by said return the gross estate of said Gustave E. Shukert was returned by these defendants as of the value of $801,095.68, less deductions for expenses of administration, debts of deceased and exemptions amounting to $127,403.79, and the net estate so returned for taxation was $673,691.89, and the estate tax, as computed on said net estate, amounted to $26,921.57, which said tax these plaintiffs, as executrices of said estate, duly paid to the defendant on said July 6th, 1922 and hold said defendant's official receipt therefor.

4. That in said return for federal estate tax so filed, these plaintiffs showed that on May 5th, 1921, and in his life time, said Gustave E. Shukert conveyed, and transferred by deed of trust to United

States Trust Company of Omaha, Nebraska, as trustee, the following property: Fourth Liberty 4¼% Bonds of the par value of $35,000.00 and certain promissory notes and mortgage securing same of par value of $190,000.00, or, a total property of par or nominal value of $225,000.00; that a true and correct copy of the trust deed conveying said property was attached to the return so filed by these plainti-s with said defendant, and a true and correct copy of said trust deed is hereto attached, marked Exhibit "A" and made a part of this petition. That these plaintiffs in making said return of said estate for federal estate tax did not include therein as a part of the gross estate of said decreased the property or value thereof so conveyed in trust, for that: as these plaintiffs claimed and alleged, said trust was not created by said Shukert or conveyed and transferred by him "in contemplation of or intended to take effect in possession or enjoyment at or after his death," within the meaning of the provisions of Sec. 402 of the Revenue Act, as amended, and in force at the time of the death of said Shukert, and in said return so filed by these plaintiffs with said defendant, proof and showing was made that said trust was not created or said property transferred and conveyed by said Shukert in contemplation of death, within the meaning of the statute.

5. That thereafter on May 31, 1923 these plaintiffs received a communication from the defendant, under date of May 28th, 1923, advising plaintiffs that upon final audit and review of the return for federal estate tax on form 706 filed as aforesaid by these plaintiffs an additional estate tax had been found due in the sum of $13,685.97, and enclosing therewith a communication addressed [fol. 3] to plaintiffs from the Commissioner of Internal Revenue; that the following is a *term* and correct copy of the communication so received by these plaintiffs from said defendant:

"Treasury Department, Office of the Collector, Internal Revenue Service

District of Nebraska

In replying refer to —.

Omaha, Nebr., May 28, 1923.

Estate of Gustave E. Shukert, Elizabeth F. Shukert et al. executrices, #2228 Larimore Ave., Omaha, Nebraska.

DEAR MADAM: The enclosed communication addressed to you by the Commissioner of Internal Revenue, discloses an additional estate tax found due upon final audit and review of Form 706, final return filed in the above named estate, in the amount of $13,685.97.

As instructed, this amount should be paid within thirty days from date of receipt of this notification by you, as after expiration of such period interest will accrue at the rate of ten per centum per annum until paid.

Should further information be desired, kindly communicate with this office.

Respectfully, (Signed) A. B. Allen, Collector."

M H. Enc.

That following is a true and correct copy of the communication from the Commissioner of Internal Revenue addressed to these plaintiffs and enclosed to these plaintiffs with the foregoing communication from the defendant:

"Treasury Department, Office of Commissioner of Internal Revenue

O. F. #37. Washington, May 25, '23.

Address reply to Commissioner of Internal Revenue and refer to ET, 1319 -RKS, District of Nebraska, Estate of Gustave E. Shu- [fol. 4] kert. Date of death: September 29, 1921. Tax liability: $13,685.97.

Elizabeth F. Shukert et al., executrices Estate of Gustave E. Shukert, care of Collector, Omaha, Nebraska.

MESDAMES: A review and audit of the return on Form 706 filed for this estate and of the report of investigation discloses a total tax liability of $40,607.48. The return shows a tax liability of $25,921.51, which has been paid. The amount due is $13,-685.97, which should be paid to the Collector of Internal Revenue at Omaha, Nebraska, without delay, as Section 407 of the Revenue Act provides that the excess part of the tax shall bear interest at the rate of ten per centum per annum from the expiration of thirty days after the date of the receipt of this letter until payment is received by the Collector.

The return has been verified as correct except as to the following:

(2—Estate of Gustave E. Shukert—Gross Estate)

Stocks and bonds:

	Returned	Determined
$11,050.00, U. S. Liberty Loan Bonds.....	$9,752.73	$9,757.15
$ 2,050.00, U. S. First Liberty Loan.....	1,859.35	1,859.13
$ 8,100.00, U. S. Second Liberty Loan....	7,315.92	7,319.97

Transfers:

The value of the following described property, transferred by decedent in his lifetime, is included in his gross estate, it having been determined after consideration of all the facts that such transfers are taxable under the provisions of the Federal Estate Tax Law; $190,000.00, notes of Eleanor Peterson	00.0	151,400.00
$35,000.00, U. S. Fourth Liberty Loan....	00.0	31,718.75
Accrued Interest	0.00	7,024.53

	Determined	Returned
Difference between net estate returned and determined, to balance.....	190,151.55	

[fol. 5] This letter shows the Bureau's determination of the estate tax liability of this estate, and assessment will at once be made on this basis. All questions relating to the discharge of this tax should be taken up direct with the Collector and not with this office.

Respectfully, R. M. Eestes, Deputy Commissioner."

NBM.

That on said review and audit of the return on Form 406 filed as aforesaid by these plaintiffs, the said return was verified as correct, except as to the value of the liberty bonds shown therein which said value was increased on said final review and audit in the sum of $8.27 over the value of the said bonds as returned by these plaintiffs in their said report on Form 706, and that the additional tax assessed against said estate by reason of said increase in value of liberty bonds was fifty (50c) cents; that the remainder of said sum of $13,685.97, to-wit: $13,685.47 was assessed as additional estate tax because on said final review and audit there was wrongfully and without authority of law added to the gross value of said estate of said Gustave E. Shukert, as returned by these plaintiffs on said Form 706, the sum of $190,143.28 as the value of the property transferred and conveyed by said Gustave E. Shukert in his life time by the deed of trust attached to this petition and marked Exhibit "A"; that on June 28th, 1923, and within thirty days from receiving the aforesaid communication from the defendant, these plaintiffs paid to defendant, as Collector of Internal Revenue as aforesaid, the said sum of additional estate taxes, to-wit: $13,685.96, paying $13,685.47 of said sum under protest and duress, and received from said defendant a receipt for said payment, which said receipt is in words and figures following:

"Treasury Department
U. S. Internal Revenue Estate Tax Receipt :List 23A May 1923 6
Form 803 Executor's copy : (month) 4 (Folio)
Revised Feb., 1923. In Duplicate. :Date of death 9-29-21
Collector....District of Nebraska : Tax according to
At Omaha Actual date of payment June : return .....$.....
28, 1923. : Interest 6%.....
NOTE.—Payment of the tax indicated : day .....$ .....
by the return of Form 706 is not conclusive : ..% penalty...$...
as to ultimate tax liability. An investiga- : Balance of tax
tion will be conducted to verify the accur- : according to
acy of the return. If tax in excess of the : Commissioner's
amount indicated by the return is disclosed : Notifi c a-
[fol. 6] and one year and 180 days have : tion.. $13,685.97
elapsed since the decedent's death, inter- : Interest 10%.....
est will attach at the rate of 10 per cen- : days.....$
tum per annum on and after the expira- : Total $13,685.97
tion of 30 days from receipt of such ex- : Received payment,
cess tax. (Section 407, Revenue Act of : June 28, 1923
1921.) : A. B. Allen.
Estate of Gustave E. Shukert, : Collector of Internal
Elizabeth F. Shukert, et al., Exec. : 2—8971 Revenue."
Omaha, Nebr.
Paid under protest.

That these plaintiffs protested the payment and paid under duress and protest said sum of $13,685.47 of said additional estate tax for the reason that the same was assessed against said estate wrongfully and contrary to law and was illegal, unlawful and void and its exaction and collection illegal, unlawful and void, for this, that on said audit and review, of the return for federal estate tax on Form 706 as filed by these plaintiffs on July 6, 1922 as aforesaid, there was wrongfully and without authority of law added to the gross value of the estate of said Gustave E. Shukert, deceased, the sum of $190,143.28 as the value of that certain property which said Shukert on May 5, 1921 and during his life time transferred and conveyed by a certain deed of trust, a copy of which is attached to this petition and marked Exhibit "A" thereof; and that said sum of $13,685.47 so paid under protest and duress as aforesaid is the amount of the additional estate tax assessed against the estate of said Shukert by reason of the inclusion in his gross estate the value of the property so conveyed by him by said deed of trust, as aforesaid; that the inclusion of the value of said property so conveyed by said Shukert by said deed of trust as a part of his gross estate at the time of his death, and the assessment of said additional estate tax in the sum of $13,685.47 on account thereof, and the demanding and exaction of payment of same from these plaintiffs was wrongful and contrary to law and illegal, for that: said Shukert did not convey and transfer said property by said deed of trust in contemplation of his

death, or to take effect in possession or enjoyment at the time of or after his death, and that said property so transferred was not at the time of the death of said Shukert a part of the gross estate left by said Shukert or taxable as such, within the purview and meaning of Sec. 402 of the Revenue Act of the United States of America in force at the time of the death of said Shukert.

6. That thereafter these plaintiffs on July 3rd, 1923 on Treasury Department Internal Revenue Service Form 843 duly filed with the [fol. 7] defendant, Collector of Internal Revenue as aforesaid, claim for refund of said sum of $13,685.47 and additional assessment of estate taxes paid under protest as aforesaid, on the ground that said sum represented the additional federal estate tax assessed against the estate of said Gustave E. Shukert, deceased, by reason of the inclusion in the gross estate of said deceased of the property and the value thereof transf-rred and conveyed by said Shukert in his life time by that certain deed of trust, copy of which is hereto attached, marked Exhibit "A" of this petition, the ground of said claim for refund being that the property and value thereof so transformed and conveyed by said Shukert in his life time was not a part of his estate subject to taxation for federal estate taxes, for that; said Shukert did not create said trust or transfer and convey said property in contemplation of death or to take effect in enjoyment and possession on and after his death, within the purview of the statute providing for the assessment and payment of federal estate taxes.

7. That thereafter said claim for refund was refused and denied by the Commissioner of Internal Revenue of the United States of America and these plaintiffs notified thereof by letter, under date of November 23rd, 1923; that the following is a true and correct copy of said letter of notification:

"Treasury Department, Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to ET-1319-C1R.—PEM. District of Nebraska. Estate of Gustave E. Shukert. Date of death: September 29, 1921.

Washington, November 23, 1923.

Elizabeth F. Shukert et al., [executrices] estate of Gustave E. Shukert, 2228 Larimore Avenue, Omaha, Nebraska.

MESDAMES: The Bureau has examined the claim filed by you as Executrices of the above named estate, for refund of $13,685.47, Federal estate tax paid under the Revenue Act of 1918.
[fol. 8] Your protest is directed against the inclusion in the decedent's gross estate of the property set out in the closing letter under the caption "Transfers."

The items involved, together with the values as returned, as determined on review, and as adjusted herein, are as follows:

Transfers	Returned	Determined	Adjusted
$190,000 notes of Eleanor Peterson.....	$0	$151,400.00	$151,400.00
$35,000 U. S. Fourth Liberty Loan.....	0	31,718.75	31,718.75
Accrued interest.....	0	7,024.53	7,024.53

(2—Estate of Gustave E. Shukert.)

In May, 1921, less than five months prior to his death, the decedent established a trust fund in favor of his children. The trust fund was to be held intact and accumulated for thirty years and at that time was to be paid over to the children. At the time of making this trust, the decedent was 56 years of age. It appears that for many years prior to his death the decedent had been afflicted with chronic asthma and bronchitis. These diseases had the effect of enlarging his hear- and lungs and other organs, so that at the time of making these transfers it is reasonable to believe he was in such a physical condition to make the average man more than normally apprehensive of death. This trust fund constituted approximately 25% of his estate.

The estate has not established or even attempted to show or give any reasons or notice for the making of these transfers, which are inconsistent with contemplation of death. The only reason presented by the estate, that of assisting his children and encouraging them in saving, is not inconsistent with contemplation of death, but it is in harmony with either expectation of living for a long period of time or contemplation of death as imminent.

In this case there does not seem to be any reasonable hypothesis as to the cause of the transfers other than that they were made in contemplation of death. The trust fund amounted to a material part of the decedent's estate. No special occasion for the creation of this trust existed. It was made within two years of the decedent's death and therefore the burden of proving that it was not made in contemplation of death rested on the estate. In the opinion of the Bureau the presumption that it was so made has not been rebutted [fol. 9] by the estate and accordingly the transfer is determined to be taxable and was properly included in the decedent's gross estate.

In view of the foregoing, your claim for refund of $13,685.47, is rejected in full amount thereof.

Respectfully, D. G. Blair, Commissioner."

MYR.

8. That said additional federal estate tax of $13,685.97 assessed against the estate of said Gustave E. Shukart, deceased, and paid by these plaintiffs aforesaid was and is illegal and void and levied and assessed without authority of law, and the inclusion in the

gross estate of said Gustave E. Shukert, deceased, at a valuation of $190,143.28 of the property transferred and conveyed by said Shukert by that certain deed of trust attached to this petition and marked Exhibit "A" thereof was wrongful and without authority at law and said property so conveyed was no part of the estate of said Gustave E. Shukert at the time of his death, nor taxable as such, for that: said Gustave E. Shukert did not convey and transfer said property in trust by the aforesaid deed of trust in contemplation of his death or to take effect in possession or enjoyment at and after his death; that at the time of the creation of said trust said Gustave E. Shukert was fifty-six years of age, active in his business, in apparent good health had a life expectancy of between sixteen and seventeen years; that his family consisted of himself, his wife, two daughters who were then of age, and a minor son about sixteen years of age; that the property so conveyed represented less than twenty-five per cent in value of his property and estate, that is to say, that after transferring and conveying said property in trust as aforesaid, the said Shukert had and retained property of the net value of upwards of $750,000.00, of which not less than $500,000.00 was in the form of liquid assets such as notes secured by mortgages, bonds and stocks; that in conveying and transferring said property in trust as aforesaid said Shukert but carried out a purpose which he had declared long prior thereto, that is to say: for many years prior to the creation of said trust, said Shukert owned a large five story brick building in the city of Omaha known as the Railway Exchange building, and was actively engaged in the wholesale and retail fur business and in said fur business occupied and used a part of said Railway Exchange building as a sales room and work-shop and factory; that long prior to the creation of said trust, said Shukert [fol. 10] declared his intention of selling said Railway Exchange building and closing out his fur business, stating that when he sold said building he would reserve a lease on the part thereof occupied by him until February 1st next following such sale, during which period he would close out and liquidate his fur business, and that upon the sale of said building he would take assets of such sale and place them in a trust to accumulate for the benefit of his children; that on February 1, 1921 said Shukert sold said Railway Exchange building for the stated consideration of $225,000.00, of which $35,000.00 was paid in cash or its equivalent, and the balance of $190,000.00 was taken back in the form of ten notes, each for the sum of $5,000.00, one of said series of notes maturing each year thereafter and one note for $140,000.00 maturing thirty years thereafter, or, February 1, 1951, all of said notes being secured by a first mortgage on said Railway Exchange building; and on the sale of said Railway Exchange building, said Shukert reserved a lease on the rooms therein occupied by him for his fur business until the first of February, 1922, paying rent therefor as a tenant to the new owner; that thereafter, on May 5, 1921, said Shukert, consistent with his purpose theretofore declared, made, executed and delivered the deed of trust, copy of which is attached to this petition as Exhibit "A," and delivered to the trustee therein named the said notes and mort-

gages aggregating $190,000.00, and Fourth Liberty 4¼ Bonds of the par value of $35,000.00, the liberty bonds being the equivalent of cash he received on the sale; and by the terms of said trust deed, as appears from an inspection thereof, the trust created thereby terminates on February 1, 1951, the date of the maturity of the $140,000.00 note received on the sale of said Railway Exchange building.

9. That no part of said sum of $13,685.47 has been paid by reason of the premises and there is due these plaintiffs from the defendant the sum of $13,685.47, with interest thereon at the rate of one-half of one per cent per month from July 3, 1923.

Wherefore, plaintiffs pray judgment against the defendant for the sum of $13,685.47, with interest thereon at the rate of one-half [fol. 11] of one per cent per month from July 3, 1923, and costs of suit.

Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, Deceased, by W. H. Herdman & A. F. Mullen, Attorneys.

STATE OF NEBRASKA,
County of Douglas, ss:

Elizabeth F. Shukert being duly sworn says she is one of the plaintiffs [name] in the foregoing petition; that she has read the contents of said instrument, knows the contents thereof, and the facts therein stated are true, as she verily believes.

Elizabeth F. Shukert. (Seal.)

Subscribed in my presence and sworn to before me this 25 day of February, 1924. Robert A. Nelson, Notary Public.

Deed of Trust

Know all men by these Presents that G. E. Shukert, hereinafter known as the Founder, for and in consideration of the sum of One ($1.00) Dollar to him in hand paid, receipt of which is acknowledged, does hereby grant, bargain, sell and convey unto the United States Trust Company of Omaha, Nebraska, as Trustee only, hereinafter known as the Trustee, the following property, to-wit:

Notes aggregating One Hundred Ninety Thousand ($190,000.00) Dollars (secured by first mortgage) of Eleanor Peterson dated February 1st, 1921, with interest at Five (5%) per cent until maturity and seven (7%) per cent from maturity until payment, said notes being due as follows:

February 1, 1922	$5,000.00
February 1, 1923	5,000.00
February 1, 1924	5,000.00
February 1, 1925	5,000.00
February 1, 1926	5,000.00
February 1, 1927	5,000.00
February 1, 1928	5,000.00
[fol. 12] February 1, 1929	5,000.00
February 1, 1930	5,000.00
February 1, 1931	5,000.00
February 1, 1951	140,000.00
Fourth Liberty 4¼% Bonds par value	35,000.00
	$225,000.00

To Have And to Hold the above described property unto the said United States Trust Company, its successors and assigns, in trust for the use and benefit of those hereinafter designated under the following terms, provisions and conditions, to-wit:

Said Trustee shall receive and collect all income which may accrue to said trust fund and shall administer the same (as hereinafter provided) and shall invest, reinvest, manage and control said trust fund subject to the conditions and provisions hereinafter set forth.

1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter name-, such person or persons may be allowed from the income of this Trust Fund a Sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty ($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. Any and all such sums paid in this manner to any of the beneficiaries hereinafter named shall constitute a charge upon and shall be deducted from their share, or the share they would have taken if living, of the Trust Fund at its termination.

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one [fol. 13] (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that

any of the above named children of the Founder shall die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying then shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issue shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above named beneficiaries shall die without issue before the termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita.

3. Investments and reinvestments of said Trust Fund may be made by the Trustee at any time as may be in the best interest of the Trust Fund.

4. Investments and reinvestments are to be made preferably in United States, State and Municipal Bonds, and in such other securities, not including stocks, as are legal investments for trust funds.

5. The Founder at any time hereafter may deliver to the Trustee additional property for the purpose of adding to the principal of the trust fund created by this instument. In this case the Founder shall file with the Trustee an instrument in writing duly signed by himself describing such additional property and stating that he delivers the same for the purpose of making it a part of the principal of the trust fund created by this instrument. The Trustee, upon receiving such additional property and such written instrument, shall in writing acknowledge receipt of said property as a part of the Trust Fund created by this instrument, and deliver, or mail by registered letter, a copy of said receipt to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund. All such additional property which has been so deilvered to and so received and receipted for by the Trustee as such under the provisions of this article, and any additional property received hereunder by the Trustee as such from any source shall be deemed to be and is hereby assigned, sold, trans-[fol. 14] ferred, set over and delivered to the Trustee in trust for the uses and purposes and especially subject to all the terms, conditions and provisions in this instrument contained and set forth. It is hereby agreed that all of said property when and if so received by the Trustee, is received by it in trust and the Trustee hereby declares and agrees that it will hold the same (if and when it has been so received) together with all money and all property of every kind and character for which the same or any of the same may at any time be exchanged or which may in any manner result from or grow out of the same for the uses and purposes and especially subject to all the terms, conditions and provisions contained and set forth in this instrument to the same effect as if such additional property so received by the Trustee under the provisions of this article or from any other source had been received by the Trustee as a part of the original trust fund at the time of the execution of this instrument.

6. It is understood and agreed that the trustee shall receive as compensation of its services a sum equal to three (3%) per cent of the income from said trust fund and shall be reimbursed for all necessary expenses in connection therewith. In no event is the Trustee to receive or be paid any compensation for collecting the principal funds of said trust, or for investing or reinvesting any funds belonging to said trust.

7. It is understood and agreed that the Trustee shall make annually a report in writing of its acts and doings as such Trustee showing income received, disbursements and charges, investments and reinvestments, and deliver or mail by registered letter, a copy of such report to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund.

8. Immediately after the execution of this agreement, the Trustee shall prepare and deliver to the wife of the Founder, if living, and to each of the beneficiaries, above named, a duly certified copy of this instrument.

Signed this 5th day of May, A. D. 1921.
G. E. Shukert, United States Trust Company of Omaha, Nebraska, as Trustee, by Abraham L. Reed, President.

Witnesses: M. B. Gulick, Sarah M. Lemley.

[fol. 15] *Duly sworn to by G. E. Shukert, Abraham L. Reed, H. M. Bushnell. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

ANSWER—Filed March 31, 1924

The defendant for answer to plaintiff's petition admits the allegations of the first and second paragraphs of the petition to be true. Also admits that on July 6, 1922 the plaintiffs filed with the defendant as Collector of Internal Revenue their return of said estate for federal estate tax, that the estate tax computed on said return amounted to $26,921.57 and that the plaintiffs paid said tax to the defendant July 6, 1922 and took a receipt therefor. Also admits that in said return filed by the plaintiffs for federal estate tax, the plaintiffs showed that on May 5, 1921, Gustave E. Shukert conveyed by deed of trust to United States Trust Company of Omaha, Nebraska, as trustee, certain property of the value of $225,000.00; that plaintiffs in making said return for federal estate tax did not include therein as part of the gross estate of the deceased the property or value thereof so conveyed in trust because of the fact that plaintiffs claimed that said Gustave E. Shukert had not conveyed said property in contemplation of death. Also admits that on May 31, 1923

plaintiffs received a communication from the defendant under date of May 28, 1923, advising plaintiffs that upon final audit and review of the return for federal estate tax filed by plaintiffs as above set forth additional estate tax had been found due in the sum of $13,685.97; that a copy of defendant's said letter to the plaintiffs is set forth at page 3 of the Petition and that a copy of the Deputy Commissioner's Letter referred to by the Collector is set forth at pages 3, 4, and 5 of the Petition. Also admits that on June 28, 1923 plaintiffs paid to the defendant as Collector of Internal Revenue said sum of additional estate taxes, namely $13,685.96, paying $13,685.47 of said sum under protest, and the defendant gave plaintiffs the receipt for said payment which is set forth at Page 6 of their petition.

Defendant also admits that on July 3, 1923 on a legal form provided for that purpose plaintiffs filed with the defendant claim for refund of said sum $13,685.47 and that plaintiffs in making said claim for refund again contended that Gustave E. Shukert had not made the conveyance of said property aggregating $225,000.00 hereinbefore referred to in contemplation of death. Also admits that subsequently by letter of Commissioner of Internal Revenue dated November 23, 1923, said claim for refund was refused and denied by the Commissioner and that the Commissioner's letter is set forth at Pages 7 and 8 of plaintiffs' petition.

[fol. 17] Defendant specifically denies that said additional estate tax was wrongfully or unlawfully assessed or collected and denies each and every allegation of plaintiffs' petition not hereinbefore specifically denied or admitted to be true.

Wherefore, defendant prays that he may be dismissed hence without day and have and recover his costs from the plaintiffs.

Arthur B. Allen, Collector Of Internal Revenue, District Of Nebraska, Defendant, by James C. Kinsler, United States Attorney.

Duly sworn to by Arthur B. Allen. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Before Judge Woodrough

IMPANELLING OF JURY—May 19, 1924

This cause came on regularly for trial, the plaintiffs, Elizabeth F. Shukert and Isabel C. Shukert, executrixes of the Estate of Gustave E. Shukert; and the defendant Arthur F. Mullen and W. H. Herdman; and the defendant Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, appearing by his attorneys James C. Kinsler, U. S. Attorney, and Thomas H. Lewis, Special

Attorney, Bureau of Internal Revenue, Washington, D. C.; also came the following named persons as jurors to try said cause, to-wit:

[fol. 18]

John A. Lovgren,	James McGonigal,	Fred J. Lienemann,
R. H. Stoner,	L. E. Bossard,	Adam Gramlich,
Warren D. Hancock,	H. W. Cowderoy,	Edward E. Jenson,
Zeno F. Plunkert,	Eli McCurt,	Felix L. Gallagher,

who are duly impanaled and sworn to try said cause. Opening statements are made by the respective attorneys, testimony is adduced and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until tomorrow morning.

IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT AND JUDGMENT—Filed May 20, 1924

This day again came the parties hereto, by their respective attorneys; also the Jury heretofore duly impaneled and sworn to try said cause. At the conclusion of the testimony Instruction No. 1 requested by the defendant and filed herein, was given by the Court. Thereupon, the Court directed the Jury to return a Verdict in favor of the defendant, which was accordingly done and which said verdict is in words and figures following, to-wit:

[Title omitted]

"Verdict for Defendant

We, the Jury in the above entitled cause, find in favor of the Defendant therein.

Dated this 20th day of May, 1924.

Felix L. Gallagher, Foreman."

[File endorsement omitted.]

It appearing to the Court that the Jury has returned a Verdict in the above entitled cause in favor of the defendant, Arthur B. [fol. 19] Allen, Collector of Internal Revenue, District of Nebraska, and against the plaintiffs, Elizabeth F. Shukert and Isabel C. Shukert, Executrixes of the estate of Gustave E. Shukert, it is thereupon.

Ordered, Adjudged and Decreed, by the Court, that the defendant, Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, have and recover of and from the plaintiffs, Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, his costs herein expended the defendant to have execution therefor, to which ruling of the Court the plaintiffs except.

In United States District Court

Plaintiff's Requested Instructions to Jury—Filed May 20, 1924

Instruction No. 1

You are instructed that the deceased, Gustave E. Shukert, had a right to dispose of his property in such manner as he saw fit. He had a right to give it to the children outright or to give it to them in the form of a trust such as he provided in the trust deed that has been introduced in evidence. The laws of the United States provide that estate taxes shall be assessed on all property transferred or conveyed by the owner, without consideration, in contemplation of death. What the law intends to do and in effect does is to tax all property where the owner makes a testamentary disposition of the same.

Instruction No. 2

You are instructed that by the term "in contemplation of death" is not meant on the one hand that general expectancy of death which is entertained by all persons, for every person knows that he must die. On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. The term "in contemplation of death" involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonable close future is the moving cause of the transfer.

[fol. 20]

Instruction No. 3

You are instructed that under the law applicable to the case, as made by the evidence, no presumption exists in favor of either party, and the sole issue for you to determine is whether the transfer of property made by the deed of trust in evidence was made by the deceased, Gustav E. Shukert, in contemplation of death. The law places the burden of proving that such conveyance was not made in contemplation of death upon the plaintiffs. If you find from the evidence that the deceased did not make and execute said deed of trust conveying said property in contemplation of death, then your verdict will be for the plaintiffs, and you should return a verdict for plaintiffs in the sum of $13,685.97 with interest thereon at the rate of one-half of one per cent per month from July 3, 1923.

Instruction No. 4

You are instructed that if you find from the evidence that the deceased, at the time he made the trust deed which has been in-

troduced in evidence and created said trust, did not make it in contemplation of death, then your verdict should be for the plaintiffs. You should find that there is due from the defendant to the plaintiffs the sum of $13,685.97, with interest thereon at the rate of One-half of one per cent per month from July 3, 1923.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed June 17, 1924

Now come the plaintiffs Elizabeth F. Shukert and Isabel C. Shukert in the above entitled cause and assign errors in the trial and decision of said District Court in said cause as follows:

1. Said court erred in holding that under the pleadings, the evidence and the law, the trust created by Gustave E. Shukert in his life time was intended to take effect, in possession or enjoyment, at or after his death and that the property conveyed by and held under the trust deed of date May 5th, 1921, was taxable, as a part of the estate of said Gustave E. Shukert.

2. Said court erred in giving to the jury instruction No. 1, as requested by the defendant, as follows:

"You are instructed that under the undisputed evidence the trust created by Gustave E. Shukert in his life time was intended to take [fol. 21] effect in possession or enjoyment at or after his death and that your verdict should be for the defendant."

3. Said court erred in charging the jury to return a verdict for defendant.

4. Said Court erred in not submitting to the jury for determination the issues between the parties.

5. Said court erred in entering judgment on the verdict returned by the jury.

6. Said court erred in refusing to give to the jury instruction No. 1 requested by the plaintiffs, as follows:

"You are instructed that the deceased, Gustave E. Shukert, had a right to dispose of his property in such manner as he saw fit. He had a right to give it to his children outright or to give it to them in the form of a trust such as he provided in the trust deed that has been introduced in evidence. The laws of the United States provide that estate taxes shall be assessed on all property transferred or conveyed by the owner, without consideration, in contemplation of death. What the law intends to do and in effect does is to tax all property where the owner makes a testamentary disposition of the same."

7. Said court erred in refusing to give to the jury instruction No. 2 requested by the plaintiffs, as follows:

"You are instructed that by the term 'in contemplation of death' is not meant on the one hand that general expectancy of death which is entertained by all persons, for every person knows that he must die. On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. The term 'in contemplation of death' involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonable close future is the moving cause of the transfer."

8. Said court erred in refusing to give to the jury instruction No. 3, requested by the plaintiffs, as follows:

[fol. 22] "You are instructed that under the law applicable to the case, as made by the evidence, no presumption exists in favor of either party, and the sole issue for you to determine is whether the transfer of property made by the deed of trust in evidence was made by the deceased, Gustave E. Shukert, in contemplation of death. The law places the burden of proving that such conveyance was not made in contemplation of death upon the plaintiffs. If you find from the evidence that the deceased did not make and execute said deed of trust conveying said property in contemplation of death, then your verdict will be for the plaintiffs, and you should return a verdict for plaintiffs in the sum of $13,685.97 with interest thereon at the rate of one-half of one per cent per month from July 3, 1923."

9. Said Court erred in refusing to give to the jury instruction No. 4 requested by the plaintiffs, as follows:

"You are instructed that if you find from the evidence that the deceased, at the time he made the trust deed which had been introduced in evidence and created said trust, did not make it in contemplation of death, then your verdict should be for the plaintiffs. You should find that there is due from the defendant to the plaintiffs the sum of $13,685.97, with interest thereon at the rate of one-half of one per cent per month from July 3, 1923."

Wherefore, the said Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, plaintiffs in error, pray that the judgment of the District Court of the United States

for the District of Nebraska, Omaha Division, in the case entered, be reversed.

Dated at Omaha, Nebraska this 12 day of June, 1924.

Elizabeth F. Shukert and *Isabel C. Shukert*, Executrices of Estate of Gustave E. Shukert, by Arthur F. Mullen, Their Attorney.

[File endorsement omitted.]

PETITION FOR WRIT OF ERROR—Filed June 17, 1924

To the Hon. Joseph W. Woodrough, judge of the District Court aforesaid:

Now come Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, by attorney, and respectfully [fol. 23] show that on the 20th day of May, A. D. 1924, the court directed a verdict against your petitioners and in favor of Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, defendant, and upon said verdict a final judgment was entered on the 20th day of May, A. D. 1924 against your petitioners, Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert. Your petitioners feeling themselves aggrieved by said verdict and judgment entered thereon, as aforesaid, and having duly filed an assignment of errors, herewith petition the court for an order allowing them to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Eighth Circuit, under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioners pray that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at St. Louis, in the state of Missouri, in said circuit, for the correction of the errors complained of and herewith assigned be allowed, and that an order be made fixing amount of security to be given by the plaintiffs in error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, by Arthur F. Mullen, Their Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Filed June 17, 1924

Upon motion of Arthur F. Mullen, attorney for the plaintiffs herein, and upon the filing of this petition for a writ of error and assignment of errors, it is ordered:

That a writ of error be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the judgment heretofore entered herein, and that the amount of the bond on such writ of error be, and the same is hereby taken at the sum of $500.00;

[fol. 24] It is further ordered that upon the giving of said bond all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 17 day of June, 1924.

J. W. Woodrough, Judge.

[File endorsement omitted.]

Bond on writ of error for $500.00 approved and filed June 18, 1924; omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR AND RETURN—Filed June 18, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judge of the District Court of the United States for the District of Nebraska, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the April Term, 1924, thereof, between Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, and Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, a manifest error has happened, to the great damage of the said Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to [fol. 26] the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 17th day of August, A. D. 1924, to the end that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 18th day of June, A. D. 1924.

Issued at my office in the City of Omaha, Nebraska, with the seal of the District Court of the United States for the District of Nebraska, dated as aforesaid.

R. C. Hoyt, Clerk U. S. District Court, District of Nebraska.
(Seal U. S. Dist. Court Dist. of Neb., Omaha Div.)

Allowed by J. W. Woodrough, Judge.

Return to Writ

UNITED STATES OF AMERICA,
District of Nebraska,
Omaha Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Ap-eals for the Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said District Court, at my office in the City of Omaha this 12th day of August A. D., 1924.

R. C. Hoyt, Clerk U. S. District Court, District of Nebraska.
(Seal U. S. Dist. Court, Dist. of Neb., Omaha Div.)

[File endorsement omitted.]

[fol. 27] Citation in usual form, showing service on Arthur B. Allen, filed June 18, 1924; omitted in printing.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions.

CAPTION

Be it remembered, that on the 19 day of May, 1924, at the regular April, 1924 Term of the District Court of the United States, for the District of Nebraska, Omaha Division, Honorable J. W. Woodrough, Judge, presiding, the above entitled cause was called for trial, and a jury impaneled and sworn therein, and the trial commenced and [fol. 28] continued to and on the 20 day of May, 1924; Arthur F. Mullen, Esq. and W. H. Herdman, Esq. appearing for plaintiffs; and

J. C. Kinsler, Esq., United States Attorney, and Thomas H. Lewis, appearing for defendant; at which trial plaintiffs and defendant, each respectively, introduced and offered evidence, both oral and documentary, as hereinafter set forth; and objections were made thereto, rulings had on such objections, and exceptions taken to such rulings as follows:

Mr. Mullen: At this time, plaintiffs offer in evidence the deed of trust marked "Plaintiff's Exhibit 1."

Plaintiffs' Exhibit 1 is received in evidence without objection, is hereto attached, made a part of this record, and is as follows:

PLAINTIFF'S EXHIBIT 1

Know all men by these presents that G. E. Shukert, hereinafter known as the Founder, for and in consideration of the sum of One ($1.00) Dollar to him in hand paid, receipt of which is acknowledged, does hereby grant, bargain, sell and convey unto the United States Trust Company of Omaha, Nebraska, as Trustee only, hereinafter known as the Trustee, the following property, to-wit:

Notes aggregating One Hundred Ninety Thousand ($190,000.00) Dollars (secured by first mortgage) of Eleanor Peterson dated February 1st, 1921, with interest at five (5%) per cent until maturity and seven (7%) per cent from maturity until payment, and said notes being due as follows:

February 1, 1922	$5,000.00
" 1, 1923	5,000.00
" 1, 1924	5,000.00
" 1, 1925	5,000.00
February 1, 1926	5,000.00
" 1, 1927	5,000.00
" 1, 1928	5,000.00
" 1, 1929	5,000.00
" 1, 1930	5,000.00
" 1, 1931	5,000.00
" 1, 1951	140,000.00
Fourth Liberty 4¼% Bonds par value	35,000.00
	$225,000.00

To have and to hold the above described property unto the said United States Trust Company, its successors and assigns, in trust for the use and benefit of those hereinafter designated under the [fol. 29] following terms, provisions and conditions, to-wit:

Said Trustee shall receive and collect all income which may accrue to said trust fund and shall administer the same (as hereinafter provided) and shall invest, reinvest, manage and control said trust fund subject to the conditions and provisions hereinafter set forth.

1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty ($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. Any and all such sums paid in this manner to any of the beneficiaries hereinafter named shall constitute a charge upon and shall be deducted from their share, or the share they would have taken if living, of the Trust Fund at its termination.

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above named children of the Founder shall die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issues shall have attained the age of twenty-one (21) years. In case [fol. 30] they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above named beneficiaries shall die without issue before the termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita.

3. Investments and reinvestments of said Trust Fund may be made by the Trustee at any time as may be in the best interest of the Trust Fund.

4. Investments and reinvestments are to be made preferably in United States, State and Municipal Bonds, and in such other securities, not including stocks, as are legal investments for trust funds.

5. The Founder at any time hereafter may deliver to the Trustee additional property for the purpose of adding to the principal of the trust fund created by [by] this instrument. In this case the Founder shall file with the Trustee an instrument in writing duly signed

by himself describing such additional property and stating that he delivers the same for the purpose of making it a part of the principal of the trust fund created by this instrument. The Trustee, upon receiving such additional property and such written instrument, shall in writing acknowledge receipt of said property as a part of the Trust Fund created by this instrument, and deliver, or mail by registered letter, a copy of said receipt to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund. All such additional property which has been so delivered to and so received and receipted for by the Trustee as such under the provisions of this article, and any additional source shall be deemed to be and is hereby assigned, sold, transferred, set over and delivered to the Trustee in trust for the uses and purposes and especially subject to all the terms, conditions and provisions in this instrument contained and set forth. It is hereby agreed that all of said property when and if so received by the Trustee, is received by it in trust and the Trustee hereby declares and agrees that it will hold the same (if and when it has been so received) together with all money and all property of every kind and character for which the same or any of the same may at any time be exchanged or which may in any manner result from or grow out of the same for the uses and purposes and especially subject to all [fol. 31] the terms, conditions and provisions contained and set forth in this instrument to the same effect as if such additional property so received by the Trustee under the provisions of this article or from any other source had been received by the Trustee as a part of the original trust fund at the time of the execution of this instrument.

6. It is understood and agreed that the trustee shall receive as compensation for its services a sum equal to three (3%) per cent of the income from said trust fund and shall be reimbursed for all necessary expenses in connection therewith. In no event is the Trustee to [received] or be paid any compensation for collecting the principal funds of said trust, or for investing or reinvesting any funds belonging to said trust.

7. It is understood and agreed that the Trustee shall make annually a report in writing of its acts and doings as such Trustee showing income received, disbursements and charges, investments and reinvestments, and deliver, or mail by registered letter, a copy of such report to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund.

8. Immediately after the execution of this agreement, the Trustee shall prepare and deliver to the wife of the Founder, if living, and to each of the beneficiaries, above named, a duly certified copy of this instrument.

Signed this 5th day of May, A. D. 1921.

G. E. Shukert, United States Trust Company of Omaha, Nebraska, as Trustee, by Abraham L. Reed, President.

Witnesses: M. B. Gulick, Sarah A. Lemley.
Attest: H M. Bushnell, Secretary. (Corporate Seal.)

STATE OF NEBRASKA,
County of Douglas, ss:

I, H. T. Cutler, a Notary Public in and for the County and State aforesaid, do hereby certify that G. E. Shukert, personally known to me to be the same person named in and who subscribed to the above [fol. 32] and foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 5th day of May, A. D. 1921.

H. T. Cutler, Notary Public in and for the County and State Aforesaid. Commission expires Jan. 10, 1924. (Notarial Seal.)

STATE OF NEBRASKA,
County of Douglas, ss:

I, Sarah A. Lemley, a Notary Public in and for the County and State aforesaid, do hereby certify that Abraham L. Reed and H. M. Bushnell, personally known to me to be the President and Secretary of the United States Trust Company of Omaha, Nebraska, a Nebraska corporation, doing business at Omaha, Nebraska, and to be the same persons who subscribed to the above and foregoing instrument on behalf of said corporation, appeared before me this day in person and severally acknowledged that they signed and sealed with the corporate seal, the said instrument as the free and voluntary act of said corporation and as their own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 5th day of May, A. D. 1921.

Sarah A. Lemley, Notary Public in and for the County and State Aforesaid. Commission expires Oct. 19, 1926. (Notarial Seal.)

I hereby certify and attest that the foregoing is a true and correct copy of the original Deed of Trust in our possession, executed May 5, 1921, by G. E. Shukert to the United States Trust Company of Omaha.

Hubert M. Bushnell, Secretary. (Notarial Seal.)

Dated this 24th day of Dec. 1921.

[fol. 33] Doctor E. HOLOVTCHINER is here called and sworn as a witness on behalf of plaintiffs. Being examined in chief by Mr. Mullen, he testified as follows:

Q. State your name?
A. E. Holovtchiner.
Q. Where do you live?

A. I live in Omaha.
Q. How long have you lived here?
A. Thirty-six years.
Q. Are you a physician and surgeon?
A. Yes sir, I am.
Q. Have you been practicing your profession all that time here?
A. All the time.
Q. Where are your offices?
A. At 15th and Harney, in the building known as "The Sunderland Building."
Q. Is that the building that was formerly owned by Gustave E. Shukert?
A. It is.
Q. You knew Gustave E. Shukert in his lifetime, did you?
A. Yes, sir.
Q. How long did you know him?
A. I have known him over thirty years.
Q. And part of that time did you act as his physician?
A. Yes, the last couple of years off and on.
Q. You were a tenant there in this building, were you?
A. Yes sir.
Q. Were you well acquainted with it?
A. Yes, I was.
Q. Tell the jury in a general way how well you knew him?
A. Well, I have known Mr. Shukert for a good many years, and I have known him more intimately since he was owner of the building where I had my offices, and we used to meet every day and talk with each other, and once in a while he would consult me about some trouble, some ailment.
Q. Those visits on which you talked with him were visits like people would have. You talked with him about other things?
A. Yes, we talked about other matters, he told me how to invest my money, and how to make money.
Q. And did those visits and talks continue over a number of years?
A. Yes.
Q. Now, did he consult you in your professional capacity?
A. He has, yes sir.
Q. Did you examine him so that you know his general physical condition?
A. Yes, I have examined him repeatedly.
Q. How long before his death did you first examine him?
[fol. 34] A. Well, I have examined him off and on—I mean superficially—the last couple of years, but as to a thorough examination, I examined him about in April, I think, 1922, I think it was.
Q. Was that the year of his death?
A. The year of his death.
Q. I think it was 1921 he died?
A. He died in 1922, I think.
Q. No, it was 1921. In April before he died you examined him thoroughly?
A. Yes.

Q. How far back of that did you first examine him?

A. Oh, probably a year or so, a year or two. I did not examine him thoroughly, but then I would suggest to him what to do for his trouble that he had, whatever it was that he called me for to see him

Q. What did he have when you first examined him?

A. Only asthma.

Q. What is that "asthma"?

A. It is a difficulty in breathing. It is due to a spasmodic condition of the lungs.

Q. What kind of asthma did he have, if you know?

A. He had what is called a "fur" asthma, a condition that is produced by handling fur. There are different kinds and this is the asthma which is called "fur" asthma, and you can get that by handling fur. People who are tending horses will get asthma by handling the skin and hides of the horses. There are quite a number of other conditions which will produce asthma, and Mr. Shukert's asthma was purely fur asthma?

Q. Is that a fatal malady?

A. No, asthma is not a fatal malady in itself. You can live a great many years with it.

Q. Was this particular kind of asthma that Mr. Shukert had—was that a fatal malady?

A. No, the asthma itself was not a fatal malady, but in time it will produce complications.

Q. Now, at this time you examined him in the spring before he died, what did you find?

A. I found then that the man was suffering from bronchitis which is due to the asthma and to an enlargement or widening of the lungs—what I mean is, the lungs do not collapse when you exhale, and it is a condition which is called "emphysema." It is due from long standing asthma and bronchitis.

Q. Was there an acute condition of this disease at the time you examined him?

[fol. 35] A. No, there was nothing acute. There was more or less an acute condition of his heart, which in the last stages would dilate and give him trouble that way too.

Q. Was he up and around and attending to business?

A. Yes, he was always up and around and attending to business, but finally in April I advised him, on account of his heart condition, to go to bed and stay there for a length of time, for several weeks.

Q. And what did he say to that?

A. He objected to it, and objected very strenuously to going to bed, but he finally submitted to my orders and did go to bed and stayed there three weeks. Then he came back again to the office and to his store. I chided him very severely for disobeying my orders and not staying in bed, because it would probably give him trouble if he did not, then he would say that, "I will probably outlive you, and I do better if I am up, and do better if I go to my store", and tried to explain to him that this disease was *very* dangerous for him to be up and around, and especially to try and attend to business, and he would not mind me. He said he was al- right, and he always used to joke and say he would outlive me.

Q. Did he suggest at any time any thought of dying, or what would he say?

A. That never occurred to him. He never has mentioned any death or that he was liable to die. That was far from his thoughts.

Q. Well now, finally were you consulted by him about the time he died?

A. Yes. After coming back to the office and staying at home only three weeks, and contrary to my orders, he finally took sick, very dangerously, and collapsed in the store and then I immediately took him to the hospital.

Q. How long after this first conversation—six or seven months afterwards?

A. No, that was a short time after that—I can't remember the date—and then I sent him to the hospital.

Q. You sent him to the hospital just shortly before he died?

A. Just shortly before he died.

Q. And this other conversation you had was when?

A. That was after April.

Q. Some time in the summer?

A. Some time in the summer, yes.

Q. About how long was it before he went to the hospital, how long was it before that that you had this conversation with him at [fol. 36] the time he had this sick spell—two or three months?

A. I think it was in April or May, and I sent him to the hospital in September.

Q. Well now, during that time he was around there every day attending to business?

A. Yes, with the exception of the three weeks he stayed at home.

Q. Well, I mean the rest of the time before you sent him to the hospital, he was down there around the store and attending to the store?

A. Yes sir.

Q. And he was doing the things that he had done ordinarily

A. Yes, I suppose so. I saw him in his store and in his shop?

Q. What did he go to the hospital for?

A. When he went to the hospital he had quite a number of complications. He had asthma and his heart trouble, and he had also his stomach trouble and an enlargement of the liver, and conditions which follow usually respiratory diseases.

Q. What finally happened that caused his death?

A. He finally died—he also developed in the last stages, pernicious anemia, and finally died of exhaustion and heart trouble, chiefly the heart trouble—his heart gave out. It was very much enlarged.

Q. How long was he in the hospital before he died?

A. I think it was about a couple of weeks or so.

Q. Did you see him at different times then?

A. Yes, I saw him every day.

Q. Did he finally reach a place where he concluded he was about to die?

A. No, he never thought of dying. He never had any fear of dying.

Q. What did he say about it?

A. He never talked about death, never mentioned it, never thought of dying.

Q. Did you know of his serious condition while he was at the hospital?

A. Oh yes, I told him of his serious condition.

Q. Did you advise him as to that?

A. Oh yes, I did.

Q. What did you tell him?

A. I told him his condition was rather precarious. I also told him that he ought to bring his affairs in order.

Q. How long was that before he died?

A. Oh, it was only a few days before he died.

[fol. 37] Q. Did you advise him that he was in a condition where he ought to close up his business?

A. Yes sir.

Q. And put his affairs in order?

A. Yes, I advised him that.

Q. What did he say?

A. He never said anything.

Q. Did you ever advise him as to that before that time?

A. No, I did not.

Q. That was the first time you advised him of that?

A. The first time I advised him, yes.

Q. Was there anything said, Doctor, at any time in your acquaintance with him, back seven or eight months or five or six months—or, was there anything said prior to the time he went to the hospital, regarding his contemplated death, or figuring that he was going to die right away?

A. No, he never mentioned death.

Q. How many different times did he suggest that he was going to live longer than you were?

A. Oh, that was several times.

Q. That was when you were consulted by him?

A. Yes, I told him he ought to take care of his asthma because he might have some serious complication, and he always laughed it off, and said, "I will outlive you."

Cross-examination.

By Mr. Lewis:

Q. Doctor, you made an examination in May that you described as being—or, rather, I should say in April—that you described as being the first thorough examination?

A. Yes sir.

Q. Did you at that time examine his urine?

A. Yes, I did.

Q. What did you find?

A. I found his urine normal.

Q. How long had that condition of asthma continued at the time you saw him in April, 1921?
A. He had that asthma as long as I had known him.
Q. And I think you said you had known him thirty years?
A. Thirty years—he was always wheezing.
Q. That condition was gradually growing worse, I understand you?
A. Yes, it usually grows worse.
Q. Now, he had in April, 1921, at the time you thoroughly examined him, he had asthma?
A. Yes.
Q. And he had bronchitis?
A. Yes.
Q. And he had an enlarged heart condition?
[fol. 38] A. I don't think he had—no, he did not have it in April, because I took an X-Ray of his heart in the hospital.
Q. You had not discovered it in April?
A. I discovered it so as to be sure after taking the X-Ray.
Q. Had you discovered it before that time?
A. No.
Q. Had you suspected it?
A. Yes, one would suspect it.
Q. And in your thorough examination, although you suspected that heart condition, you did not discover it?
A. No, there was no valvular trouble with his heart.
Q. He has some stomach trouble?
A. Yes.
Q. Did you suspect that condition in April, 1921?
A. Yes, because——
Q. (Interrupting.) Did you examine him to ascertain?
A. Well, I did because when I gave him the medicine for the asthma, his stomach would not tolerate it.
Q. So that he had stomach trouble in April, 1921?
A. Yes.
Q. And he knew that?
A. I suppose he did know it.
Q. You say he couldn't take your medicine?
A. No, he couldn't take the medicine. He was rather a poor hand to take medicine.
Q. He also had some trouble with his liver, didn't he?
A. Yes.
Q. Did you examine him in April, 1921, as to that?
A. Yes, he had that.
Q. You discovered that?
A. Yes, he had an enlarged liver.
Q. I suppose after you made that thorough examination that Mr. Shukert wanted to know something about his condition, didn't he?
A. No. No, in fact I have forced him to come into my office to be examined. He never would consent to an examination, but knowing him for a good many years, I forced him to come into

the office and find out about his condition to give him an idea about his condition.

Q. Your idea was to tell him how sick he was?

A. Yes.

Redirect examination.

By Mr. Mullen:

Q. Doctor, I looked over your affidavit here and there is some discrepancy about this date. Will you ascertain from your books just exactly about that?

A. Yes, I thought of that. My books have a date of April. Now, that may have been a charge in my books for some work I did in April in my office.

[fol. 39] Q. Now then, in your affidavit it says that the day you examined him first was in July, 1921, which was about three months before his death. Will you look it up and get definitely the date when you examined him?

A. Well, in April, I think I have examined him in my office.

Q. Well, whatever date it was, you ordered him home and he went home and stayed three weeks. That is the time you refer to?

A. Yes.

Q. That was in July, wasn't it?

A. Yes, that was in July, but there was a mark in my little memorandum there under the date of April, and it must be that I have prescribed for him and made a charge.

Q. Can you ascertain what date it was that you sent him home?

A. Well, that was in the summer some time.

Q. Some time in the summer?

A. Yes.

Q. That is what I am getting at: Was that the time you made the examination?

A. Yes.

Q. Well now, so we won't have any dispute about that, you consult your books so we can get the exact date this afternoon when you did send him home?

A. All right.

Q. That is what I want to get at.

A. Very well.

At this time, it being the noon hour, a recess was taken until two o'clock P. M.

Monday, May 19, 1924—2:00 o'clock p. m.

Afternoon Session

Further proceedings were as follows:

The Court: You may proceed further, gentlemen.

Doctor E. Holovtchiner, the witness on the stand at the time of taking the noon recess, resumed the witness stand, and his Redirect Examination was continued by Mr. Mullen, as follows:

Q. Since you were on the stand have you made an examination of your books and records to ascertain the date when you examined Mr. Shukert?
A. Yes, sir.
Q. What date was that?
A. It was on the 5th day of July.
Q. What year?
A. 1921.
Q. Was that the date you have——
A. (Interrupting.) That is the date which I have in my book, it is marked, "5-7-21." That means the fifth day of the seventh [fol. 40] month, 1921. Furthermore, my books show that I sent him home on August 18th, and he stayed three weeks. He came back to the shop and stayed there until September 14th, when he collapsed, and I took him to the hospital on September 14th, and he stayed there until September 29th, when he died.

The Court: Now Doctor, explain to us that notation of the date. The American way is to note the numeral of the month first and then the day of the month next, and then the number of the year.
The Witness: Well, I do that just opposite.
The Court: And that is the European way of doing it?
The Witness: Yes, that is it.

Redirect examination continued.

By Mr. Mullen:

Q. Now Doctor, do you remember being examined before the appraiser, or some one at the state court?
A. Yes.
Q. You are the same Dr. Holovtchiner that gave testimony at that time?
A. Yes sir.
Q. And you were asked about those dates at that time two years ago?
A. Yes sir.

Further cross-examination.

By Mr. Lewis:

Q. Have you your book with you, Doctor?
A. No.
Q. Now, you made an affidavit on May 8th, 1924. Do you recall that occasion?
A. May?
Q. May 8th, 1924.
A. Yes, to Mr. Johnson.
Q. As I understand you now, you say the date of this examination, instead of being in May was in July?
A. Yes.
Q. That you have an entry in your books showing that the examination was on 5-7?
A. Yes sir.
Q. Which indicates to your mind that it was the seventh month and the fifth day.
A. Yes sir.
Q. That is correct, is it?
A. Yes sir.
Q. Now, in your affidavit that I have before me, you said that the date was May 5th?
A. That is a mistake.
Q. So that a reversal of those figures would not account for the May 5th date, would it?
[fol. 41] A. No, I made that verbal mistake, but the books show it was 5-7.
Q. Now, when you made this first affidavit, which — presented to the department dated June 27th, 1922, do you recall that affidavit?
Q. Where did I make that affidavit?
Q. Well, you made it before Robert A. Nelson, a notary public, to be filed with the Bureau of Internal Revenue.
A. I have made several affidavits and of course I don't recollect any date.
Q. Now, that examination which you now place in July was, as I understand it, the first thorough examination that you made of Mr. Shukert?
A. Yes sir.
Q. You filed a bill in this estate before the Probate Court?
A. I think I did, yes.
Q. Did you put any date in that bill?
A. I think I have, but I don't remember now.
Q. You don't remember those dates, do you?
A. No.
Q. Now, in this affidavit that you made before Mr. Johnson you give a still further date. That date is April 7, 1924. I suppose that was also a mistake?
A. Yes, I took the fifth day. That was a mistake. 5-7 is the date. Mr. Johnson saw the figures in my book, 5-7.

Q. I am asking you to explain this date of April 7th?
A. It was a mistake.
Q. Of course you know April is the fourth month, not the fifth month?
A. Exactly.

Witness excused.

Doctor A. W. EDMISTON is here called and sworn as a witness on behalf of plaintiff. Being examined in chief by Mr. Mullen, he testified as follows:

Q. Doctor, how long have you lived in Omaha?
A. Since 1883.
Q. Are you a physician and surgeon?
A. Yes sir.
Q. How long have you been practicing medicine, Doctor?
A. Forty-four years.
Q. For forty-four years practiced here in Omaha?
A. No, I have practiced in Omaha Forty-one years?
Q. Has that been in general practice all the time?
A. Yes sir.
[fol. 42] Q. Did you know Gustave E. Shukert in his life time?
A. Yes sir.
Q. Do you know his family?
A. Yes sir.
Q. Have you been acting as physician for that family for some time?
A. I think about thirty years—covers that period.
Q. Do you know the children?
A. Yes sir.
Q. Did you attend the wife during the confinement for those children?
A. Yes sir, I did.
Q. You were the attending physician at the birth of all three of those children, were you?
A. Yes sir.
Q. Did you ever treat Mr. Gustave E. Shukert?
A. Oh, not of any significance. Perhaps in my early experience with Mr. Shukert he was troubled with asthma, and I did some little work for him, not very much, and in all of my years of experience with him I think I did very little for Mr. Shukert.
Q. Now then, did you ever treat him for a fractured shoulder?
A. I think I did in some years gone by. It must have been ten or twelve years or more that he had a fracture of the shoulder.
Q. You speak about his having asthma. How long did he have that asthma?
A. Oh, when I first was acquainted with the family he had some asthma—he had asthma attacks, and whenever he would take cold he would have this asthma and have some trouble with it.
Q. Does that go back thirty years?

A. Well, twenty years.

Q. What kind of asthma was it—was it fur asthma?

A. Well, I don't know.

The Court: It has been testified here that furriers and those who handle fur a great deal sometimes have this kind of asthma.

A. I don't know as that produced it. He has asthma just as anybody has asthma. The only thing is that his asthma came on perhaps, I think, from being confined and housed up, and constipation, and his stomach became deranged. All that produces [fol. 43] asthma, because after he would get an attack he would generally go down to the springs for a few weeks and clean up, and his asthma would all clear up.

Q. During those times he consulted you, did he talk with you about the condition of his health?

A. Never did of any significance at all. He was a man that did not believe very much in doctors, and believed very little in medicine, and thought that what we told him was all fol-de-rol anyway, and all he had to do was to get busy and get to work and that he would be all right. That was his attitude generally.

Q. Did you see him in September, 1921, about the time he was taken to the hospital?

A. September 13, 1921, I was called to see Mr. Shukert. At that time he was home.

Q. What was his condition at that time?

A. It was very bad.

Q. Well, describe in a general way what it was.

A. His feet and limbs were bloated; his heart was not very good, and he showed general conditions of affection of the kidneys, and I examined the urine which proved that he did have disease of the kidneys, Bright's Disease, and he told me he had seen a doctor and that they wanted him to go to a hospital and be treated, but he thought it was all fol-de-rol; that it was not necessary to do that, and he called me out there to get my opinion, to know if I felt as though he ought to go to the hospital, and if I couldn't do something for him and he stay at home. He said he thought I could give him something perhaps that in a few days would help him out and he would feel better and he would be all right. But his general conditions all through were of such nature that I felt that the man was all poisoned with uremic poisoning, and I advised him to go to the hospital by all means, and I told him I felt as though he was seriously ill, ill enough to go to the hospital and be taken care of. But he really laughed and joked with me at the time and said us doctors always tried to work a bill on them and things of that kind; that we were always telling things that there was nothing in, and that we didn't know anything about it. But he afterwards did consent to go, and went to the hospital afterwards, I understood, but I didn't see him afterwards.

Q. Prior to the time you speak about, when you had these consultations, did he impress you as having the thought of dying?

A. He impressed me always as thinking that the condition was [fol. 44] trivial; that it was just because he had worked too hard

and that all he needed was to take a little rest and that he ought to be back at work very soon.

Q. Was that in September when you saw him?

A. That was in September when I saw him, and seeing the man in the condition he was and all that, and the general symptoms it shocked me wonderfully and I could hardly realize at all that he could feel so lightly about it, because he looked to me and had all the appearance of being a very dangerously sick man. He didn't seem to realize it and didn't seem to comprehend it.

Q. Prior to that time was there anything he said to you that would indicate to you that he had any thought of dying in mind?

A. No, he did not, because even at that time he spoke about that he thought he could rest up a few days and be back to his business again. No, he did not express himself in the least as though he thought he was dangerously ill.

Q. You say that was on the 13th of September, 1921?

A. Yes sir.

Cross-examination.

By Mr. Lewis:

Q. Doctor, this condition that you explain here was a condition which grew on Mr. Shukert, wasn't it, that is to say, it was not a condition that had suddenly arisen?

A. No sir.

Q. So those various diseases must have been in progress for a good long time?

Q. Might have been, yes.

Q. Might have been, or must have been?

A. No, I don't know as it must have been, because we can get those attacks coming on from colds or something of that kind that causes the kidneys to inflame. It might have been over a month, or two months, or three months—it might not have been over that duration, because in my examination of the urine at that time I did not get any tube casts which would indicate that the body of the kidney was affected and was sloughing out.

Q. You did get some casts?

A. No sir. I got plenty of albumen, but no casts.

Q. That examination, I understood you to say, was made in September?

A. September 13th, 1921.

Q. That was about two weeks before the death?

A. I don't know what date he died on.

[fol. 45] Q. He died on the 29th. Now, was there any indication of heart trouble at that time?

A. Some trouble.

Q. What was the nature of that trouble?

A. Why, I couldn't say—If I remember rightly I don't think there was any organic affection of the heart. The heart has that appearance as though it labors hard, as though it was putting more

hard work on it than it can take care of, which we get often with affection of the kidney.

Q. His heart action was due perhaps to——

A. (Interrupting.) Due to the general condition he was in at that time, if I remember rightly.

Q. Now, let's see: He had some stomach trouble too, didn't he?

A. Mr. Shukert always had more or less affection of his stomach at different times, and he had constipation, but I think it was due more to his [sedetary] habits and vocation and neglect, and things of that kind.

Q. He had some bronchitis, didn't he?

A. Not that I know of. His bronchial trouble may have been due to the asthmatic affection. That would give him that trouble because all those asthmatics have more or less bronchial trouble.

Q. You did not discover any such trouble in your examination?

A. No, I did not, not any more than we would usually have with the condition he was in. With that condition we would have a certain amount of bronchial irritation on account of the laborious condition of the lungs from the kidneys, and that way it produces enough irritation so we would get a bronchitic breathing to that extent.

Q. Did you make any statement in regard to Mr. Shukert's condition to any representative of the Government in connection with this case?

A. Any representative of the Government?

Q. Yes.

A. Not that I know of.

Q. Do you know Mr. Johnson of the Collector's office?

A. I do not.

Q. This is Mr. Johnson sitting at the table. You do not recognize him?

A. I do not recognize him, he might have come in the office.

Q. Of course then, you do not remember making any statement to him?

A. I do not remember now.

[fol. 46] Q. Do you remember making any statement at all to any one other than plaintiffs' attorney in relation to this case and your attendance upon Mr. Shukert?

A. No, I don't know as I do. I may have done so, but I do not recollect it.

Q. Did you see Mr. Shukert more than once in 1921?

A. No sir.

Q. Just the one time?

A. Just the one time.

Q. You were the family physician, were you?

A. Had been, yes.

Q. That is to say, outside of Mr. Shukert himself, you attended the rest of the family?

A. Yes.

Q. Did you have occasion to call on the family in the spring of 1921?

A. No, I don't think so. His last few years they had a very little sickness, and I was called there very litle.

Q. You were called by Mr. Shukert himself though in September?

A. I was called from the house. I don't know whether Mr. Shukert called me or who called me.

Q. I mean for himself?

A. Yes sir.

Q. There was another doctor in attendance at that time—of course you don't know it, but I mean as a matter of fact?

A. Yes, he told me he had been attended by some physician, and that that was the reason he called me out there, was because they told him he would have to go to the hospital and all that, and he didn't feel that it was necessary for him to go to the hospital, and he said, "I wanted to have you see me, and I thought perhaps I would find out if it was necessary for me to go to the hospital or not."

Q. You of course told him to do as his doctor advised him to do, or something like that?

A. Why, any physician that would look at the man I should think would know that he ought to go to the hospital and go there pretty quick.

Q. But you don't remember any statement that you made to any representative of the Government in connection with his case?

A. I don't remember of any, no.

Q. Now, taking into consideration all the symptoms that you found at the time of your examination, would that justify a statement by you that the condition then existing could not have arisen suddenly, but must have arisen over a period of years.

[fol. 47] Mr. Mullen: I object to that as not a proper hypothetical question.

The Court: Overruled,—what do you say, Doctor—might you have made such statement?

A. Why, I would like to simplify that a little. I would not say it had been over a period of years, but that might have existed some months, but not years.

Redirect examination.

By Mr. Mullen:

Q. Now, from what took place and what he said there, what do you say whether or not this man contemplating death?

Mr. Lewis: This is objected to as not proper redirect examination.

A. What is that?

Q. From what he said at the time you were talking with him there at the time of that examination that counsel has spoken about,

what do you say as to whether he was contemplating death or not at that time?

Mr. Lewis: Objected to as not proper redirect examination and calling for a conclusion of the witness, and being the questions for the jury to determine in this case.

Objection sustained.
Plaintiffs except.

Witness Excused.

A. L. REED is here called and sworn as a witness in behalf of plaintiffs. Being examined in chief by Mr. Mullen, he testified as follows:

Q. Your name is Abraham L. Reed?
A. Yes sir.
Q. What business are you in, Mr. Reed?
A. I am the president of the United States Trust Company engaged in business in Omaha.
Q. You knew Mr. Shukert in his lifetime?
A. Yes sir.
Q. Do you remember the occasion when he prepared, or went into a trust agreement with your company?
A. Yes sir.
Q. With whom did he talk about that?
A. The negotiations were almost entirely with Mr. H. T. Cutler, one of the vice-presidents of the United States Trust Company, and I had, myself, one talk that I remember distinctly with him, and pos-
[fol. 48] sibly others.
Q. Was this talk with reference to creating this trust?
A. Yes sir.
Q. About when was that Mr. Reed?
A. It was the date of the signature. It was about the early part of May, 1921.
Q. Where was this conversation?
A. It was at the door of my office.
Q. Who was present?
A. Mr. H. T. Cutler, Mr. Shukert, Mr. Harber and myself.
Q. Now what, in a general way was said—the substance of *was* was said?
A. Mr. Cutler said, "Mr. Reed, Mr. Shukert wishes to speak to you a minute." I stepped out of the door of my office, which I was just entering, and said, "Yes." Mr. Cutler then walked up to me with Mr. Harber and Mr. Shukert, and I shook hands with Mr. Shukert, and he said, "Mr. Reed, I am now signing up a trust agreement about which we have had negotiations. In making this trust agreement I want to say that I do so by reason of my regard for your company, and especially my regard for Mr. Cutler." I said, "Thank you very much, Mr. Shukert." He said, "My transactions with banks and trust companies have been with others than with

yours; however, I have concluded to make this arrangement with your company." I said, "I appreciate that, and it is certainly a very sizable and large amount to put into a trust, and it will be of great benefit to your children." "Well," he said, "That is my object in making this trust, and I hope at a later day, possibly within a few years, to add materially to the same in trust." I said, "That will be very acceptable, I am sure, and we will be prepared to give it proper attention when that day comes." That is the principal recollection I have of the conversation.

Mr. Mullen: You may cross-examine.
Mr. Lewis: No questions.

Witness excused.

JOHN H. CALDWELL is here called and sworn as a witness in behalf of plaintiffs. Being examined in chief by Mr. Mullen, he testified as follows:

Q. What is your name?
A. John H. Caldwell.
Q. Are you connected in some way with the United States Trust Company?
A. Yes sir.
[fol. 49] Q. What office do you hold?
A. Vice-president.
Q. Did you know Mr. Shukert in his lifetime, Mr. Caldwell?
A. Just slightly up until the time I had some negotiations with him in our company.
Q. Now, referring directly to it: Did you have some talk or negotiations with him about the time he created this trust and gave you folks this trust deed?
A. Yes sir.
Q. How many times did you talk with him and where were your talks?
A. I can't fix the exact number of times, but there were some preliminary negotiations, probably three or four, all taking place in my office in the United States Trust Company.
Q. Who were present?
A. Mr. Shukert at all times, and his daughter once or twice, at least once, and Mr. Cutler, and I believe Mr. Herdman; at least Mr. Herdman passed on the draft of the trust deed afterwards. I forget whether it was in my own office or his, but I think it was sent to his office.
Q. Was there considerable negotiations back and forth before this trust was perfected?
A. Yes.
Q. How long was it under negotiation?
A. I think approximately thirty days.
Q. Do you know who originally prepared the trust deed?
A. The draft was prepared in our office and sent to Mr. Herdman, his attorney, for criticism and revision, and final copy.

Q. And that was the one that was finally signed up?

A. Yes sir.

Q. Now what reasons did Mr. Shukert give you for creating this trust?

A. He said this was an arrangement he made for the future of his family, I do recall that I said to him that it was a very large sum. I said to him at the time, I said, I hope you are not "trusting" your whole estate, and you do not want to tie up more than you can afford to. He said, oh no, I have much more than this, but this is something I am putting aside for the future of my family to see that they will never come to want. It is a provision I am making for them.

Q. Was there anything said in that conversation to the effect that he thought he was going to die, or about to die?

A. No, sir; not to me.

[fol. 50] Q. Anything that would indicate that to you—state what, if anything, was said like that.

A. No, sir; nothing. I had some dealings with him later on but nothing was said in those conversations either. They were with regard to investments.

Q. Do you remember who it was that prepared this original draft?

A. I think I did, sir.

Q. You think you did?

A. I am quite sure I did, yes sir.

Q. Now, with Mr. Cutler in the office, he had some negotiations with Mr. Shukert too, didn't he?

A. Yes sir, he was the one that brought Mr. Shukert to me.

Q. Were there some changes made in the draft you proposed, changes in the one that was finally signed?

A. Well yes, there were one or two additions. They were more or less minor, they did not change the general intent of the instrument.

Q. How did you get the information to put into this—where did you get that from?

A. You mean the terms?

Q. Yes.

A. Why, Mr. Cutler first told me before I met Mr. Shukert, told me what Mr. Shukert had in mind, and we prepared a draft, trying to incorporate in this draft the provisions that would cover what he wanted.

Q. Then did you get the information included in this from conferences you had with Mr. Shukert?

A. Well, before we finished our final draft we did, yes sir, we talked to him.

Q. I notice in subdivision 5, it provides for putting in additional property in the future?

A. That is a standard provision in all our trust agreements.

Q. Did you discuss that with him?

A. I presume I did. I went over the whole thing with him. We use that to obviate drawing new provisions and then the new securities can be put in under the same provisions as the original deed.

Q. Do you remember discussing that paragraph with him?
A. I don't know as to that particular provision, but I went over the provisions in there and discussed them with him.

Mr. Mullen: You may cross-examine.
Mr. Lewis: No cross-examination.

Witness excused.

[fol. 51] R. W. HARBER is here called and sworn as a witness on behalf of plaintiffs. Being examined in chief by Mr. Mullen, he testified as follows:

Q You may state you name?
A. R. W. Harber.
Q. Where do you live, Mr. Harber?
A. Omaha.
Q. How long have you lived in Omaha?
A. Fourteen years.
Q. What line of business are you engaged in?
A. Real estate and investment business.
Q. With what company?
A. Shedd Investment Company.
Q. Where are your offices?
A. In the Sunderland Building.
Q. Was that the building formerly owned by Mr. Shukert?
A. It is.
Q. How long have you had your offices in that building?
A. Since 1909 or '10.
Q. Did you know Mr. Shukert in his lifetime?
A. I did.
Q. How long have you been acquainted with him?
A. Well, I have known Mr. Shukert during the entire time that we had offices in the building, and quite intimately for—oh, from six to ten years before his death.
Q. Now then, did you talk with him and visit with him?
A Oh yes, during the latter years of his life Mr. Shukert scarcely missed a day coming to my office, that is, when he was in the building. He used to come in and visit frequently.
Q. What floor were you on?
A. On the fifth floor.
Q. And his offices were on the first floor?
A. His store was on the first floor, but the shop, where he spent a great deal of time was on the third floor a short distance from where we were.
Q. During that time, did you talk with him and discuss with him, different propositions of business?
A. Not about his business. I discussed a great deal with him in regard to his investments, but not about his fur business particularly. I knew nothing about that.

Q. Now, did he make some investments—did you buy or sell some securities for him?

A. We handled the sale of securities and frequently investigated property on which he was buying mortgages, so at the time of his death I was quite well acquainted with all the mortgage securities he held.

Q. And those consisted of what, farm loans?

A. Farm loans and some city loans.

[fol. 52] Q. And had you purchased or negotiated any of those loans for him?

A. Quite a few.

Q. And about how long a period did those negotiations and sales cover?

A. Well, I should judge possibly five or six years actively.

Q. Did you practically purchase all of the notes for him that he purchased?

A. No, I wouldn't say that. He bought mortgages from two or three different people in Omaha, but that was probably two or three years before his death, but the last two years I think he bought practically all the mortgages through us, and we negotiated for them.

Q. He owned this building you were in, did he?

A. Yes, sir.

Q. About how long had he owned it—did he own it all the time you were in there?

A. Oh yes, he bought it prior to that.

Q. Did you know of his sale of that building?

A. Yes.

Q. Did he negotiate that option through your office?

A. No, he did not negotiate that through our office, but I think it was in July, 1919, that he came to our office and asked that the papers he signed there, and at that time there were three men, Piatti, Wear and Dumont or at least two of them, came to our office and executed an option covering the Railway Exchange Building, as it was then known.

Q. Do you know the terms of the option?

A. I know the purchase price which was to be $250,000.00, but the rest of the terms I have forgotten, if I did know.

Q. Now then, do you know whether or not that option was ever exercised?

A. The option was not exercised. The time it was made I think there was an earnest payment of $5,000.00, and the option expired in October.

Q. October of what year?

A. 1919, and at that time Mr. Shukert refunded the option money and extended the option period. Just when that expired, I don't recall. I never saw the instrument, in fact.

Q. Was it at the same price?

A. As I understand it, it was $250,000.00.

Q. Now, later on was that option exercised?

A. It was not.

Q. Now, do you know whether or not any other option was negotiated on that property, and with whom?

A. *I never saw the option, but I understand*——

[fol. 53] Q. (Interrupting.) Did you talk with Mr. Shukert about it?

A. Yes, he told me he had given another option.

Q. Did he tell you the terms of it?

A. Only in a general way as to what he—I don't believe he told me the exact terms, that is, the period which the mortgage was to cover, but I recall that it was a very long one, and it was, I think, the same as the original proposition that had been made.

Q. That is the one made to Piatti and Wear?

A. The original proposition that had been made but never put in writing. In other words, at the time the option was entered into with Piatti, Wear and Dumont, George & Company had what they thought was an agreement with him to sell the building to them at a certain price, and while that had never been reduced to writing, I believe that the terms of that original proposal were the same as those that were finally embodied in the option agreement to George & Company.

Q. To George & Company?

A. To George & Company.

Q. Now, later on, was there a sale—do you know whether or not there was a sale to George & Company?

A. Yes, there was the last of January to take effect the first of February.

Q. Of what year?

A. 1921.

Q. And do you know what the terms of that sale were?

A. The original option agreement provided for the purchase of $250,000.00 with $35,000.00 cash, and the balance in a mortgage for a considerable period. The deal, as it was finally made, was on the basis of $225,000.00. The price was reduced at the last moment on the offer of George & Company, and so the cash payment, the so-called down payment, was $35,000.00, and the balance a mortgage of $190,000.00, payable $5,000.00, a year for the first ten years, and the balance of $140,000.00 extending for a period of thirty years.

Q. Now, about this time, on and during this time did you talk with Mr. Shukert regarding what he intended to do with the proceeds of that sale?

A. He mentioned to me a number of times while the option or options, were pending, that when he sold the building, he wanted to put the proceeds in trust. Since the building had not been sold, and knowing that options sometimes expire without being operated on, I did not go into details, but when the sale was concluded, which was about the last day of January, 1921, or the first day of February, he immediately told me that he had made the sale, and that he was going to create a trust with the proceeds of the sale of the building. [fol. 54] He also told *be* at that time that he had seen some trust company with regard to handling such a trust, and he suggested that I see the United States Trust Company. Thereupon, on the 7th

day of February, 1921, or six days after the sale was consummated, I called on Mr. Cutler, who was a friend of mine, and outlined to him what Mr. Shukert had in mind, and it was to take the proceeds of the sale of this building almost bodily and transfer it over there. As I recall it, the terms of the trust, as he had mentioned them to me, would be for the period covered by the mortgage for the 140,000.00. In other words, there wasn't any particular discussion further than that this trust was to remain with the United States Trust Company until the final mortgage had been paid off.

Q. Now, when did he first tell you that he intended to put the proceeds of that building into a trust?

A. I can't tell you exactly, but he mentioned it several times just very casually, when he had the option on the building outstanding.

Q. Did he tell you that when he first had the option outstanding to Piatti and Wear?

A. Well, I can't say definitely, but it was one of those options and I am rather of the opinion that it was the first option, or the extension of the first option—I don't recall.

Q. It was some considerable time before the sale was actually made?

A. Oh yes. The first option, I think, was in July, 1919, and then there was an extention given to those same persons, Piatti, Wear & Dumont, and then after that there was an option given to George & Company, so there was a considerable period.

Q. So some considerable time before the sale was made, he told you that he intended to put the proceeds of that sale in trust?

A. Yes, it was some considerable time.

Q. Now, during that time, who managed the business down there, the fur business?

A. Well, from March 1st, 1919, to March 1st, 1920, there was a partnership that he had entered into with four men, as I recall it, and, as I recall it, the business was turned over to the partners. There was one man in charge of the sales and finances, one man in charge of the buying, and one man in charge of the shipping, and the fourth [fol. 55] one I have forgotten what his position was. But after March 1st, 1920, Mr. Shukert really ran his own business. He was sole proprietor and took care of it all.

Q. Did all the business, took care of it and magaged it, did he?

A. Yes.

Q. Now, in discussing this creation of the trust, did he talk over the terms of the trust with you?

A. Yes.

Q. Prior to the time you talked with Mr. Cutler?

A. He discussed it briefly with me before I went to see Mr. Cutler, because I wanted to have something to tell Mr. Cutler, but it simply was to the effect that he wanted this trust to continue during the term of the final mortgage, which was thirty years.

Q. Now, what, if anything, was said about conducting his business, going ahead with his business, in those conversations?

A. Well, at that time, naturally it was somewhat startling because I had not heard of the trust. In fact it was out of my line of

business, and I raised the quetsion as to why he was doing this, and he said, as I recall it, that he had that money available and that he wanted to put it over there, and that he had enough to continue whatever plans he had in mind besides that. That is, that the balance of his fortune was so large that it did not in any way impoverish him or incapacitate him from doing business or the things that he had in mind.

Q. Now, what was his condition during the years you saw him there shortly before his death. What was the condition of his health. Was he able to take care of business right along?

A. Yes, as I said, when he was in the building there was scarcely a day that he did not come to my office, and at no time did I ever think that he did not have a long expectancy. Of course there were times when he would have this wheezing, probably due to a cold, but nothing indicated to me that he was sick, or that he did not expect to live a long time.

Q. Now, then, do you know about his coming down town in the morning,—how early would he get down to his office?

A. He was always there before I got down and I was always there at eight o'clock. It was generally understood that he was one of the first down in the morning in the building. What time he got there I don't know, because I wasn't there.

Q. Did you see him after he went to the hospital, Mr. Harber?

[fol. 56] A. I saw him several times during his last illness.

Q. At the hospital?

A. At the hospital and also at his house.

Q. You were out there different times to see him and talk to him, were you?

A. I was out to his house after I returned from a western trip on which I had looked after some business for him, and when I returned on the 16th of August, I found he was ill and I went to his house and had a discussion with him, and he was then seated in the front room of the house, and he made the statement that he was going to his office the next day, and Mrs. Shukert said he would not because the doctor said he should stay at home. He did come to my office the next week, and for the rest of that month, and until the day of his being taken ill in the building, the 13th day of September, I saw him, I wouldn't say every day, but I saw him every few days. In fact I have a record of his being in my office on the 7th day of September when we discussed some mortgages that he bought from some one else.

Q. September 7th, 1921?

A. September 7th, 1921.

Q. Now, after that did you visit him at the hospital?

A. Yes, I visited him three times in the hospital. I think the 16th of September, the 22nd of September, and the 24th. On the first two dates I was dum-founded at his apparent keenness in discussing certain business deals. I might say at that time he held some cattle loan paper that was in not very good standing and he was attempting to convert that into a first mortgage loan, and we had gone along with the proceedings to the extent that it was about to be closed, and he was very much interested in that, and the first

two times I saw him he was very anxious to know all about that, and on the 16th and the 22nd, if I recall correctly, his mind was just as keen, and he gave no indication to me that he even thought that death was imminent. I cannot conceive of a man being more hopeful. *Two days after that, If I recall the date correctly, September* 24th, I was leaving Omaha to be gone a couple of weeks, and I went to see him, and when I went in the room the doctor had warned me not to talk business with him, and he made the remark, "Harber, I am down and out", and I just said a few words and went out. That was my last visit with him.

Q. Prior to this date on the 24th of September, had he ever said anything in any of the talks you had with him, that he thought [fol. 57] death was imminent, or that he had death in his mind?

A. Absolutely not at all.

Q. This was the first suggestion that he made?

A. Yes sir.

Q. The 24th of September?

A. The 24th of September, five days before he died.

Q. Did he, in those conversations with you, indicate to you about the size of his estate?

A. No, he did not, because I knew in a general way, because he had told me before.

Q. You knew something of the magnitude of his estate when he was making this trust?

A. Yes.

Q. You knew of the preparation of this draft of the trust agreemnt with the United States Trust Company?

A. Yes. Sometime after my visit with Mr. Cutler on the 7th day of February, there was a draft prepared and Mr. Shukert called me down and I read it, but I do not recall now when that was shown to me.

Q. Now then, did you talk with Mr. Shukert about this trust after you saw this draft?

A. Yes.

Q. Did he talk with you or consult with you about it?

A. Yes, we discussed the terms, and I expressed surprise at the duration of it. That was a thirty year period.

Q. What did he say about that?

A. Well, all that I recall now is that it was making provision for the family, and in no way affected his estate because he had such a large amount left and it would not interfere with any plans he had in mind for going ahead with other business arrangements.

Q. Now, were the negotiations continued from the time you first talked with Mr. Cutler down to the time the trust was finally created, negotiations backwards and forwards?

A. I do not think there were many negotiations. I think what delayed the creation of the trust was simply the drawing of the papers and the tending to the bonds and all those things. To all appearances, the building was sold on the first of February, and Mr. Shukert had made up his mind to create the trust and negotia-

tions were started with the United States Trust Company not more than six days after the sale of the building, and the final conclusion was simply delayed by getting all the papers signed up.

Cross-examination.

By Mr. Lewis:

Q. Your relations with Mr. Shukert had always been very close business relations, had they?

[fol. 58] A. For the period mentioned in my other answers.

Q. You and he were contemplating some sort of an investment business, weren't you?

A. He had suggested that we form a trust company and that he was willing to put in a considerable sum of money, and that thing had been in his mind for several years.

Q. That is, prior to the time of the sale of this building, do you mean?

A. Yes.

Q. Was it still in his mind at the time of the sale of the building?

A. He had mentioned it a number of times, and on the 7th day of September, which was between his first illness at home and when he went to the hospital, he again broached the subject but we did not go into details because he wanted to close up his business.

Q. What is your relation with the Shukert estate now?

A. I handle the collections and have handled them since the fur business was closed up on the 1st day of February, 1922.

Q. And you make investments for the estate, I suppose?

A. I would say, no. The investments are made through court order and are handled——

Q. (Interrupting.) Do you advise in regard to them?

A. Scarely any advise now, because it is all one class of investments, and the trust company is consulted in that matter.

Q. You say you were surprised at the duration of this trust. I presume you mentioned it to Mr. Shukert?

A. I did.

Q. You doubtless told him that by the time the children came to the enjoyment of this property that he would be dead, or something of that kind?

A. I said something about the age of the beneficiaries, and I may have said something about him being dead at the termination of the trust, but I do not recollect that, but I would not say I did not say it.

Q. At any rate that was not a material point in creating the trust?

A. No.

Q. He did not expect to live for thirty years. That had not anything to do with the trust?

A. I had no way of knowing of course, but I did not believe that he would live that long.

Q. In fact, was his plan to make these trust provisions—to defer these trust provisions so that if his children should dissipate or lose [fol. 59] the money which came from his estate, or from him, that they would in their middle life be taken care of by this trust fund?

A. I suppose that was it.
Q. Well, didn't he say that?
A. Well, practically said that was what would happen.

Witness excused.

W. H. HERDMAN, is here called and sworn as a witness on behalf of the plaintiffs. Being examined in chief by Mr. Mullen, he testified as follows:

Q. State your name?
A. W. H. Herdman.
Q. What is your business, Mr. Herdman?
A. Lawyer.
Q. How long have you practiced law in Omaha?
A. Thirty-four years this coming August.
Q. Were you acquainted with Gustave E. Shukert in his lifetime?
A. I was.
Q. How long have you known Mr. Shukert?
A. I can't say. I have known Mr. Shukert in a general way for many years. My first business relations with him—professional relations, began about ten years before his death.
Q. And during the last ten years of his life did you act as counsel for him in certain matters?
A. I did.
Q. In many?
A. In many matters.
Q. Did you act as counsel for him in preparing his trust deed that has been read to the jury this morning?
A. I did, but I had nothing to do with making the original draft. That was prepared by the United States Trust Company. It was sent to me by the Trust Company, or brought to me by Mr. Shukert for opinion.
Q. Now then, how long ago is it, Mr. Herdman, since you first learned from Mr. Shukert that he intended to create a trust out of part of his estate?
A. Back at the time of the negotiations, or the giving of the options covering the sale, or the proposed sale of the Railway Exchange Building. That, as I remember it, was in the summer or spring of 1919.
Q. When did Mr. Shukert tell you about creating this trust?
A. At the time he told me that if he made a sale of that property he thought he would make the trust. I remember that was the expression he used, he would, "make the trust." That is, place the proceeds of the sale in the trust.
[fol. 60] Q. Now, did he discuss that matter with you from time to time?
A. That was about all that was said at that time. He did not go into the detail or nature of the trust. He spoke of it that he "would make a trust." From time to time as the various negotiations were on for the sale of the building, or options were given for

the purchase of the building, he would speak of the subject and say he intended to place the proceeds of the building, if it were sold, in a trust.

Q. You heard Mr. Harber's testimony about the different steps that were taken with those opinions?

A. Yes, I recall that in a general way, and I might say I think I have copies of all those agreements in my office. In the late spring or summer of 1919, Mr. Shukert gave an option covering the property to Messrs. Dumont, Piatti and Wear. That option was not prepared in my office. I was not consulted about it, and didn't know anything about it until after it was given. Prior to that time there had been some negotiations between Mr. Shukert and Mr. George, of George & Company, with reference to a purchase of the property. I never heard of those at all until Mr. Shukert came to my office and told me about giving option to Piatti and his associates, and that Mr. George had been down there to claim that he had an option for the purchase of the property. I learned that nothing as between Mr. Shukert and Mr. George at that time had been reduced to writing, but there had been negotiations. Now, the first option given by Mr. Shukert to Piatti and associates was not exercised. The earnest payment which Mr. Shukert had received was returned and a new option was given to Piatti and associates expiring some time in 1920, if my memory serves me right—it expired some time in October, 1920. In the summer of 1920, Mr. George again solicited an option on the property. He was advised that an option was outstanding and held by Mr. Piatti and his associates, which would not expire until some time in October following, and that if he, Mr. George, wanted to take on option subject to the option which Piatti and his associates held, why, we would give him one, and some time in the summer or early fall of 1920, an option was given to Mr. George subject to the option held by Mr. Piatti. Piatti and associates failed to exercise their option, so the option given to George became absolute. Later on, George & Company purchased the building. The option, as given to George & Company, called for a price of $250,000.00, $35,000.00 to be paid in cash, and $215,000.00 to be carried back on the property secured by mortgage. [fol. 61] The property was sold on the deal made with George & Company, but at a reduced price of $225,000.00, of which about $28,000.00 was paid in sewer warrants of the city of Omaha, or perhaps the village of Florence, I don't remember whether Florence had been annexed at that time or not—$190,000.00 in notes carried back on the property and secured by a mortgage, and the balance, amounting to about Seven or Eight Thousand Dollars, paid in cash.

The sale of the property was closed as of February 1, 1921. Now, I can't say at this time, and do not recall whether the deed and mortgage and the notes, and so forth, were actually drawn and signed on that day or a few days thereafter, or a few days before, but the deal was closed as of February 1, 1921, and I think the notes, and so forth, bear that date.

Q. Do you know, Mr. Herdman, what contributed to this reduction in the price. Explain that, if you know what that is?

A. I think I know.

Q. Well, what is it?

A. But I don't know because of anything which Mr. Shukert told me.

Q. Was there something that occurred over there in the business just prior to the closing of that sale?

A. Yes, an occurrence, not in his business, that is, as affecting his financial status, or anything of that sort. In the fall or winter of 1920, there was an elevator accident in the building and Mr. Musgrave, one of the tenants of the building, was caught in the elevator and his leg crushed so badly that it had to be amputated. The occurrence was a distressing thing in a way. As I was advised, the elevator became wedged in the shaft and the man was held there and they could not get him loose until they called the fire department to come in there and chop that elevator to pieces, and the man was held there gripped in that elevator something like thirty minutes, and of course, in his agony he was shrieking and screaming and so on, and that distressed Mr. Shukert very, very much.

Q. Did he consult you about that?

A. Yes, he consulted me about that accident, told me of it at various times, and spoke of the distress that it gave him. He was in the building at this time and hearing the cries went up on this floor which, I think, was the third floor.

Q. Was it after that that he made the reduction in price?

A. It was after that he made the reduction in price, and my own thought has always been——

[fol. 62] Mr. Lewis (interrupting): Well, we object to that.

A. (continued). Well, I stated frankly in the beginning that it was not of anything that he told me, but I thought I knew in my own mind.

Mr. Lewis: Well, the jury had better consider that.

The Witness: Yes.

Q. Immediately after that was there something done, immediately after the sale to George & Company, to carry out this trust matter that he talked about establishing?

A. Yes. I don't think I had anything to do with the matter of the preparation of the trust until the original draft was sent or brought to my office, except that I remember that at the request of Mr. Shukert I did go down to the fourth floor in the building, to the First Trust Company, and make inquiry of that company as to what they would charge if they were selected as trustee, but beyond that I had nothing to do with the preparation of this trust until the agreement came to my office.

Q. Who brought the agreement to your office?

A. I can't say.

Q. Anyway it was the outline referred to here by Mr. Caldwell?

A. Yes, I understood it had been prepared by the United States Trust Company.

Q. Did you examine it?

A. I examined it and went through it and, as I recall, I made some suggestions as to changes, nothing material, as it occurs to me now—and suggested some additions, I can't say.

Q. Did you confer with Mr. Shukert as to the terms of this particular trust deed?

A. I did.

Q. Go ahead and relate what the discussion was?

A. After the agreement had been worked out in its final form, and as executed, I had a conference with Mr. Shukert in my office, and I then went over it with him, and I remember distinctly that I called to his attention that when this instrument was executed and delivered, and when these securities were turned over to the trust company, that he had parted finally and forever with that much property and would no longer have any control over it, and I asked him if he so understood this agreement, and if that was what he desired to do, and he stated that he understood that and that is what he desired. I remember I spoke about the terms of the trust, and here let me say that this trust was the first transaction of its kind, [fol. 63] that is, of any magnitude, that I had ever had anything to do with. I had prepared wills and things of that kind, but nothing of this magnitude or of this kind, and I spoke of the duration of the trust and asked him if he had stopped to think that his two daughters would be grandmothers before that trust expired and would probably need some money. He said, "Yes, but I have plenty of money, enough for all of us", and I then referred to his son, who, I think, was a high school boy about sixteen years of age at that time, and mentioned that when his son became of age and started in business, he might be unfortunate like a lot of young men are and might need the money before the thirty years, and I asked him if he had thought about that, and he laughed and said, "Oh well, I will be here and I will teach my boy the ways of business, I will start my boy in business", and I went through the instrument at that time callng his attention, or talking over with him various provisions, and he was satisfied with it and took it from the office, as I recall. I was not present at the time it was executed, and, of course, delivered it and delivered the securities called for by it.

Q. Now, did you have more than one conference with him about this—several conferences before this was finally consummated?

A. I would say there was more than one, but I would not undertake to say whether there was two or three or four or five.

Q. Was there, from the time this sale was consummated to George & Company about February 1st, up to the time this deed was finally signed up in May, 1921, were you making progress all the time towards closing up?

A. Yes, I think so. As far as I know they were. The draft was brought to me and I worked out the suggestions and changes that I thought ought to be made. I don't know whether I handed them to Mr. Harber or Mr. Shukert and they took them to the Trust Company, or whether I went across the street and handed them to the Trust Company myself.

Q. Was there some talk about the provision as to putting in additional property?

A. I undoubtedly went over that with him as I did every provision in that agreement, but I cannot recall at this time anything that was said specifically with reference to that particular provision.

Q. You did know when you were talking to him something about the size of his estate, did you?

[fol. 64] A. Yes. I did not know definitely, of course, but I did know enough about his affairs to know that Mr. Shukert was a wealthy man.

Q. Was there anything said by him as to the size of his estate or about what proportion this covered of his estate?

A. Oh no, I don't think there was at that time. Whatever he said on the subject was that he had plenty and this would not cripple him in his business or anything of that sort.

Q. Now then Mr. Herdman, during all these times that he was talking about creating this trust, from 1919 to 1921, what was said by Mr. Shukert about making this with reference to his death?

A. Nothing.

Q. Was there anything said at all about that?

A. Nothing.

Q. Was death ever mentioned or referred to?

A. Not in my presence.

Q. Did he ever talk or suggest in any way that this was a testamentary disposition of this particular part of the property?

A. No, sir.

Q. Now during this time do you know who it was that handled the business down here and directed it?

A. So far as I know it was Mr. Shukert.

Q. He was in charge of the business?

A. He was in charge of the business. He was the man I dealt with.

Q. Describe this man, his personal appearance and size and so forth?

A. Mr. Shukert was an undersized man, and, as I recall it now, I would say about five feet four or five inches in height. During the time I knew him I would say his weight was around one hundred and twenty five pounds, might have been something more or something less, but what we would call rather a small, undersized man.

Q. Was he an alert man?

A. He was very alert.

Q. And how about his mind, was it active?

A. Very alert and active.

Q. In these consultations did he come to you to find out what to put in or to tell you what he was going to put in?

A. He usually came and told me what he was going to put in. My part of the matter was to put them in legal form.

Q. On sug-estions made by him?

A. Yes, on suggestions made by him.

Q. Do you remember that he was ill in the summer of 1921?

A. Yes.

[fol. 65] Q. When did you first find out that he was ill?

A. I think I learned it when I either went to the store or called up the store to talk to Mr. Shukert.

Q. When was it, what month?

A. My recollection is, well, it was in the summer. I think I stated in my affidavit that I made in this proceeding that he was sick in July, but it was in the middle of 1921 some time before he went to the hospital shortly prior to his death.

Q. Did you see him during the time he was ill at his home?

A. I did not.

Q. Did you see him after he was at the hospital?

A. He came to my office on one or more occasions after he left his confinement at the house, and before he went to the hospital. After he went to the hospital in September I saw him three times. I went to the hospital four times. Three times I saw him. The first time I went there he was asleep, so the nurse told me, and I went on and did not disturb him, but I visited him at the hospital and saw him there three times. I can't tell you the date of the first occasion when I saw him, with reference to the date of his death, but I visited with — generally, and discussed perhaps some matters of business. I remember very distinctly he told me he would be down to the office and see me, and of course my visit was comparatively short in its duration, and I saw him next on the 26th day of September. I fixed that date at the time because I drew his Will and it was signed on the 27th of September. On the day before the signing of the Will, Dr. Holovtchinor, if I remember rightly, called me by telephone and told me that Mr. Shukert wished to see me at the hospital to draw his Will. I inquired of the doctor if the matter was so urgent that I should take paper and pen and ink with me and sit down and write the Will in longhand right there, or if it would be safe for me to go out and get the data and come back to my office and have the Will type written in paper form, and he said there was plenty of time. I went to the hospital on the 26th—I can't state now whether it was in the forenoon or in the afternoon, but it was on the 26th, and I saw Mr. Shukert at that time and he told me in substance—I can't remember his exact words—that he was all in and down and out, or something like that, and wished me to prepare his Will. His appearance and actions at that time showed that he knew he was going to die—that [fol. 66] is, in my judgment, he showed it. I took from him the data with reference to his Will. He had the disposition of his property definitely arranged in his mind, that is, by that I mean he simply stated or recited to me what he wanted in that Will, how he wished his property to be disposed of. I made the necessary memoranda and returned to my office and prepared the Will in due form, typewritten, and on the next day I went to the hospital and the will was signed and witnessed and so forth; that was the last time I saw Mr. Shukert.

Q. Now up to that time and all the time you took care of his law business, had there been any suggestions made by him about making a Will?

A. No. He had perhaps on various occasions while I was acting as his attorney, he would say, "Well, what do you think about the Will," or something of that sort, but there was no definite talk between Mr. Shukert and myself about the preparation of his Will, and I was never commissioned to prepare the Will until on the 26th day of September, 1921. I think that is the right date of that Will, September 27, 1921.

Q. The 27th of September, 1921?

A. Yes.

At this time a recess of ten minutes was taken, after which the witness W. H. Herdman resumed the stand and his direct examination was continued by Mr. Mullen as follows:

Q. Do you remember, Mr. Herdman, of the occasion when Mr. Shukert came to your office after he had been ill at home and before he went to the hospital, and talked to you about some business affairs?

A. Yes, he called at my office one or more times between the time he left the house following his illness in the summer, and the time he went to the hospital.

Q. What, if anything, was said at that time regarding his physical condition—what did he say about it?

A. Why, in reply to some remark I made about being surprised to see him out, or something of that kind, he laughed and said something about living longer than a lot of us who thought he was sick. I don't remember the exact language but that was the substance of it.

Q. Do you know about how old Mr. Shukert was at the time of his death?

A. Yes, from what the family told me after his death and the preparation of the papers for administration.

Q. And you knew the man?

A. And the knowledge I had of the man himself.

[fol. 67] Q. How old a man was he?

A. As it comes back to me I was informed that he was fifty-six years of age, and that was borne out by his appearance and so forth,—fifty-six I think it was at the time of his death in September, 1921.

Q. Now, when something was said here by Mr. Harber regarding a lease on that of this property. Tell us what that is, did you understand what that was? When he sold the property to George & Company, did he keep a lease on part of it?

A. No. When the property was finally sold Mr. Shukert retained a lease on the quarters in the building occupied by him, that is, the store room in the corner on the first floor, and what was known as his workshop which was in the annex on the second or third floor or both. He retained a lease on those quarters until February 1st following the sale, that is, for one year, at an agreed rental stipulated in the contract. It runs in my mind it was five hundred dollars a month but that may be wrong, but I think that

was the amount of rental he was to pay during the time he continued to occupy his quarters in the building.

Q. Now then had you talked with Mr. Shukert regarding his plans after selling the building?

A. Mr. Shukert from time to time, in connection with his statement that if he sold the building he was going to put the proceeds in a trust, told me that if he sold the building he would retire from the fur business and liquidate it and secure an office of some kind in an office building and look after his investments and so forth, and travel more, and things of that kind.

Q. Afterwards did he retain those quarters?

A. He did retain the quarters until the first of February following the sale.

Q. 1922?

A. Yes.

Q. Now was there some negotiations during the summer of 1921 regarding the purchase of some property out here for headquarters—how about that?

A. I never heard of that, Mr. Mullen, prior to Mr. Shukert's death. I heard that from a person or two since, but I never heard of anything of that kind. I want to say in that connection that my experience with Mr. Shukert was such that I probably would not know of anything of that kind until the deal was concluded and I was to put it in legal form. He never consulted me about his deals, that is, the business end of them.

[fol. 68] Mr. Mullen: The plaintiffs now offer in evidence Plaintiff's Exhibit 2, which is a certified copy of the Will of Gustave E. Shukert, the deceased.

Plaintiff's Exhibit 2, is received in evidence, without objection, is read to the court and jury, is made a part of this record and is as follows:

EXHIBIT 2

I, Gustave E. Shukert do hereby make, publish and declare this my last will and testament in manner and words following, hereby revoking all former wills and codicils thereunto by me made:

1. I hereby nominate and appoint my wife, Elizabeth F. Shukert, and my daughter, Isabel C. Shukert, as executrixes of this my last will and testament and desire and request that they be permitted to serve as such without bond.

2. I direct that my executrixes as soon as possible after my death, pay all my debts including the expenses of my last sickness and burial and that if the cash on hand belonging to my estate be insufficient for that purpose, I hereby give and grant to my said executrixes full power and authority to sell so much of the personal property belonging to my estate as may be necessary to provide funds for such purpose.

3. I will and direct that my executrixes carry on the fur business and continue to carry on same, which is now conducted by me at 15th and Harney Streets, Omaha, Nebraska, until February 1st, 1922, hereby giving to my said executrixes full power and authority to carry on said business and to do all things proper and necessary to that end.

4. In the event the cash monies belonging to my estate should be insufficient to pay the costs of the administration thereof and the federal and state inheritance taxes, which may be assessed against the same, I hereby give and grant my said executrixes full power and authority to sell so much of the personal property belonging to my estate, at such times and on such terms as they deem proper and necessary, to provide cash funds for such purposes.

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5. I give and bequeath unto my wife, Elizabeth F. Shukert the family home located at #2228 Larimore Avenue, city of Omaha, Nebraska, including the lot upon which said home stands and all [fol. 69] other lots contiguous and adjacent thereto now owned by me together with all my personal effects, household goods and furnishings located in and used in said family home.

6. All the balance and residue of my estates, real, personal and mixed, corporeal and incorporeal, and of whatsoever kind and wheresoever situated, I give, bequeath and devise as follows:

a. The undivided one-fourth part thereof to my wife, Elizabeth F. Shukert to have and to hold in her own right forever:

b. The undivided one-fourth part thereof to United States Trust Company of Omaha, Nebraska, (a corporation organized under the laws of the State of Nebraska) as trustee and in trust never-the-less for the following uses and purposes: (1) To hold the same in trust for my daughter Isabel C. Shukert until she arrives at the full age of thirty years; (2) Until my said daughter shall arrive at the full age of thirty years said United States Trust Company, as trustee aforesaid, shall have, hold and keep said trust estate and shall keep and maintain the principal thereof intact and inviolate and shall have full power to receive and receipt for all moneys and property belonging to said trust estate and to invest and reinvest, from time to time, all moneys belonging to and forming a part of the principal fund or funds of said trust estate in such interest bearing securities as are recognized as proper investments for trust funds; (3) The said United States Trust Company, as Trustee aforesaid, shall receive, collect and receipt for all rents, profits, interest, dividends and income

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accruing to and arising from said trust estate, and after paying therefrom its proper charges and expenses, and all taxes and public charges levied and assessed against said trust estate, pay the remainder thereof, when and as received to my said daughter Isabel C.

Shukert; (4) When my said daughter Isabel C. Shukert arrives at the full age of thirty years said United States Trust Company shall immediately pay over and deliver to my said daughter all moneys and property belonging to said trust estate in its hands arising out of and belonging to said trust estate, less its proper expenses, charges, and taxes, and thereupon the said trust shall cease and determine.

[fol. 70] c. The undivided one-fourth part thereof to United States Trust Company, of Omaha, Nebraska, (a corporation organized under the laws of the State of Nebraska) as trustee and in trust never-the-less for the following uses and purposes: (1) To hold the same in trust for my daughter Flora G. Shukert until she becomes the full age of thirty years; (2) Until my said daughter s-all arrive at the full age of thirty years said United States Trust Company, as trustee aforesaid, shall have, hold and keep said trust estate and shall keep and maintain the principal thereof intact and inviolate and shall have full power to receive and receipt for all moneys and property belonging to said trust estate and to invest and [*and*] reinvest, from time to time, all moneys belonging to and forming a part of the principal fund or funds of said trust estate in such interest bearing securities as are recognized as proper investments for trust funds;

(3) The said United States Trust Company, as trustee aforesaid, shall receive, collect and receipt for all rents, profits, interest, dividends and income accruing to and arising from said trust estate, and after paying therefrom its proper charges and expenses, and all taxes and public charges levied and assessed against said trust estate, pay the remainder thereof, when and as

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received, to my daughter Flora G. Shukert; (4) When my said daughter Flora G. Shukert arrives at the full age of thirty years said United States Trust Company shall immediately pay over and deliver to my said daughter all moneys and property belonging to said trust estate and forming the principal thereof together with all moneys in its hands arising out of and belonging to said Trust Estate, less its proper expenses, charges, and taxes, and thereupon the said trust shall cease and determine.

(d.) The undivided one-fourth part thereof to United States Trust Company, of Omaha, Nebraska, (a corporation organized under the laws of the State of Nebraska) as trustee and in trust never-the-less for the following uses and purposes: (1) To hold the same in trust for my son Gustave E. Shukert, Junior, until he arrives at the age of thirty years; (2) Until my said son shall arrive at the full age of thirty years said United States Trust Company, as trustee aforesaid, shall have, hold and keep said trust estate and shall keep and maintain the principal thereof intact and inviolate and shall have full [fol. 71] power to receive and receipt for all moneys and property belonging to said trust estate and to invest and reinvest, from time to time, all moneys belonging to and forming a part of the principal fund or funds of said trust estate in such interest bearing securities as are recognized as proper investments for trust funds; (3) The said United States Trust Company, as trustee aforesaid, shall receive,

collect and receipt for all rents, profits, interest, dividends, and income accruing to and arising from said trust estate, and after paying therefrom its proper charges and expenses, and all taxes and public charges levied and assessed against said trust estate, pay the remainder thereof, when and as received until my said son Gustave E. Shukert Junior, shall arrive at the full age of 21 years to my wife Elizabeth F. Shukert for the care, maintenance and education of my said son; and after my said son arrives at the age of 21 years and until he arrives at the full age of 30 years, pay said sum to my said son Gustave E. Shukert, Junior; (4) When

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my said son Gustave E. Shukert, Junior arrives at the full age of thirty years said United States Trust Company shall immediately pay over and deliver to my said son all moneys and property belonging to said trust estate and forming the principal thereof together with all moneys in its hands arising out of and belonging to said trust estate, less its proper expenses, charges, and taxes, and thereupon the said trust shall cease and determine.

7. If any of my said children shall die before arriving at the full age of thirty years and leave issue him or her surviving, then and in such case, the trust estate and all rights in and benefit thereof of my child so dying shall pass to and vest in such issue, and such issue shall receive the principal and income of said trust estate in the same manner and at the same time that my said child would have received the same had she or him survived; and if any of my said children shall die before arriving at the full age of thirty years leaving no issue him or her surviving, then and in such case, the trust and trust estate hereinbefore created in favor of said child so dying shall pass to and be merged with the trust estates hereinbefore created for the benefit of my then surviving children and the principal thereof and income therefrom shall be paid over to said surviving children in like manner as though the same had originally formed a part of the trust estate hereinbefore created for said surviving children.

[fol. 72] In Witness Whereof, I have hereunto set my hand in the presence of witnesses after declaring to said witnesses and each of them, that this is my last will and testament and requesting them and each of them to witness my signature thereto, on this 27th day of September, 1921.

Gustave E. Shukert.

We, the undersigned, whose names are hereunto subscribed do hereby certify that Gustave E. Shukert whose name is signed to the foregoing instrument as testator signed the same in our presence and in the presence of each of us, after declaring to us and each of us

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that said instrument was to be his last will and testament and requesting us and each of us to witness his signature thereto, and in

his presence and in the presence of each other, we hereunto subscribe our names as witnesses as aforesaid.

Dated at Omaha, Nebraska, this 27th day of September, 1921.

Dr. E. Holovtchinor, Helene Tomek.

COUNTY COURT, DOUGLAS COUNTY, OMAHA, NEBR.

Bryce Crawford, Judge. Clyde C. Sundblad, Clerk

STATE OF NEBRASKA,
County of Douglas, ss:

I, Bryce Crawford, County Judge of Douglas County, Nebraska, do hereby certify that I have compared the foregoing copy of Will in the matter of the Estate of Gustave E. Shukert, Deceased, with the original record thereof, now remaining in said court; that the same is a correct transcript thereof, and of the whole of said original record, that I have the legal custody and control of said original record; that said court is a court of record, has a seal, and that said seal is hereto affixed; and that the foregoing attestation is in due form, according to the laws of the State of Nebraska.

[fol. 73] In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Omaha, this 1st day of October, A. D. 1921.

Bryce Crawford, County Judge, by Clyde C. Sundblad, Clerk of the County Court. (Seal.)

(Endorsed on back as follows:) In the County Court, Douglas County, Nebraska. In the matter of the estate of Gustave E. Shukert, deceased. Certified copy of will.

End of Plaintiff's Exhibit 2.

Direct examination of W. H. Herdman continued.

By Mr. Mullen:

Q. Without going into the details, Mr. Herdman, about what was the aggregate amount of the estate of Mr. Shukert?

A. As shown by the appraisement made in the estate in the course of the administration of the estate it was a little over eight hundred thousand dollars, not including, of course, this fund that was placed in trust.

Q. And this will disposed of something over eight hundred thousand dollars' worth of property?

A. Yes.

Q. And then in addition to that was the amount that was in the trust?

A. Yes, I think those are the figures. Those are the figures that run in my mind, around eight hundred thousand dollars.

Cross-examination.

By Mr. Lewis:

Q. When this building was sold and a lease retained, that was not the office Mr. Shukert intended to take for himself where he would manage his estate?

A. No. He spoke about taking that office in some office building.

Q. That was for the purpose of disposing of his fur business?

A. Yes. On one or more occasions he said that the fur business could only be liquidated following the holiday trade.

[fol. 74] Q. And the reason he retains these quarters was that he might have some place to close out his business?

A. As far as I know, yes.

Q. And this thought of his that after he had closed out his business he would rent a little office, travel some, and read good books, or whatever it was you said he would do, that had no relation to the lease that he actually made?

A. No, I don't think so.

Q. You saw Mr. Shukert quite frequently and was well acquainted with him?

A. I saw him quite frequently. I think I handled all his legal matters for ten years prior to his death apart from his collections, I did not handle those.

Q. Do you recall his appearance in 1919, the spring of 1919?

A. Generally, yes.

Q. I suppose asthma is a recurrent disease that improves in the spring time and summer?

A. Well, you will have to ask the doctor about that.

Q. You don't know whether Mr. Shukert's condition improved during the summer months, do you?

A. I wouldn't say. I don't know.

Q. Did you frequently inquire about his health from time to time?

A. I never had occasion to inquire about his health until the sickness in the summer of 1921. When I was informed that he had been sent home to remain there I would call up the store from time to time to inquire about his condition. What I heard did not cause me sufficient concern to go out to his house to see him.

Q. So you don't know much about his physical condition?

A. I don't pretend to know anything about his physical condition.

Redirect examination.

By Mr. Mullen:

Q. Did you have any understanding that this man was an invalid?

A. Why no, I had no thought about his health being other than the ordinary health that an active business man has, until this trouble in the summer of 1921—never thought about his health.

Q. You have heard these doctors talk about this asthma. Did you know he had that?

A. I wouldn't want to say that I did or did not. Now it is entirely possible if Mr. Shukert came into my office some time when seasonal or climatic conditions affected him I might have spoken about it. I wouldn't say that he ever mentioned it or did not. It [fol. 75] is quite possible that he might have said something about it, but I would not say that he did or did not.

Q. The first time you knew anything about thought anything about his sickness was in 1921?

A. It was in the summer of 1921.

Witness excused.

ISABEL C. SHUKERT, one of the plaintiffs, is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Mullen, she testified as follows:

Q. Your name is Isabel C. Shukert?

A. Yes.

Q. You are a daughter of the deceased, are you?

A. Yes.

Q. How many children are there?

A. Three.

Q. Are you the oldest daughter?

A. I am the oldest.

Q. What are the names of the other children?

A. Emil and Flora.

Q. How old is Emil?

A. He will be eighteen in May, and my sister is twenty-four.

Q. Now, during your father's lifetime were you down there helping in the business some?

A. Yes, from about 1916 on.

Q. Up to the time of his death?

A. Yes.

Q. Do you know whether or not your father had some sort of ailment prior to the time of his death?

A. Yes, he had asthma almost as long as I can remember. That was my impression, he had asthmatic spells, especially when it was very cold.

Q. That is as far back as you can remember?

A. Yes.

Q. Would he be laid up during those times?

A. No. I think he was home several days several times, but nothing serious.

Q. When did this serious illness of his commence?

A. Well, he was not feeling well in July—I think it was July, 1921, and he went to see Dr. Holovtchiner and the doctor told him he would have to go home and rest.

Q. Was that the first time he seemed to have any serious ailment?

A. Yes.

Q. And following that, in September, was when he went to the hospital?

A. Yes.

[fol. 76] Q. Now prior to the time he consulted Dr. Holovtchinor in July, had he been about as usual?

A. About as usual.

Q. Attending to business all the time?

A. All the time.

Q. Had he been down there all the time during the two or three years prior to that, running the business?

A. Yes, except for a short trip, probably, a short vacation. Otherwise he was down there.

Q. Were you down there with him?

A. Only in the business season from September until the first of the year.

Q. Did you ever hear any discussion there prior to your father's last illness about his thinking he was going to die from those ailments, prior to his last illness?

A. Never heard him say a word about dying at all.

Q. You did not learn that he was in a serious condition until he went to the hospital?

A. I did not learn that until the day of his death. I know that very morning I did not really believe it then.

Q. Do you know your father's age?

A. Yes.

Q. How old was he?

A. Fifty-six, I think.

Q. What were your father's habits about going down to the business?

A. He was a very early riser, I think he was down in the building about half past six every morning, and he left about six at night.

Q. And had that been his habit for many years?

A. For many years, very seldom varied.

Q. What part of the city did you folks live in?

A. The northern part.

Q. And he had always been engaged, as far back as you can remember, in his fur business?

A. Yes.

Q. Now then, you know Dr. Holovtchinor and Dr. Edmiston?

A. Yes.

Q. Any other doctors treat your father except those two men?

A. Not that I know of.

Q. Had he had any serious ailment of any kind up to the time of his death?

A. No.

Q. Ever have any doctors wait on him out there at the house?

A. No.

Q. Dr. Edmiston was your family physician for many years?

A. Yes.

Q. You are one of the beneficiaries under this trust agreement, are you?

A. Yes.

Q. You and your brother and sister?
A. Yes.
Q. Did you ever have any discussion with your father about the creation of this trust?
A. Yes.
[fol. 77] Q. What did he tell you about it?
A. Why, I read it over with him almost every day for a while. He wanted me to read it over a great number of times in order to improve upon the language and the thought of it. Whenever Mr. Caldwell and Mr. Cutler would suggest something new he would tell me about it. I know we talked about that trust for a month after the first copy, after the first typewritten copies come to the store.
Q. Was there anything said about his dying at that time?
A. Not a thing.
Q. You knew about his making a will, did you?
A. At the last?
Q. Yes.
A. Yes.
Q. The one Mr. Herdman has testified about?
A. Yes.
Q. Did you talk with him about that at all?
A. No, sir.
Q. You didn't know anything about that?
A. No, sir; I didn't know anything about it.
Q. Do you know whether or not he ever made any other will except this one?
A. Not to my knowledge.
Q. You never heard of any?
A. No, I never heard of it.

Cross-examination.

By Mr. Louis:

Q. Do you know Dr. A. D. Dunn?
A. No, I didn't ever meet him.
Q. He was never called to attend your father?
A. He was called for diagnosis.
Q. So that was another doctor which you did not mention. You said Dr. Edmiston and Dr. Holovtchinor.
A. Dr. Dunn was called only for diagnosis.
Q. Did your father go to Germany for something or other?
A. I believe he did when I was a baby. My mother can tell you about that. That was twenty or twenty-five years before.
Q. He never talked to you about being in bad health?
A. Never mentioned it. I always knew he had asthma.
Q. But he never talked about that even, did he?
A. He never talked about it.
Q. You said you discussed this trust with him a number of times. He talked over the terms of that trust with you?
A. Yes.

Q. And of course you knew that it provided that none of you children should have any of this money for thirty years?
[fol. 78] A. Yes.
Q. Did you ever say anything to him about that,
A. I did not. That was his money and he could do with it as he wanted to.
Q. He did not say anything to you about it?
A. No.
Q. What features of the trust did you discuss?
A. Every feature.
Q. You mean you did not discuss it but you read it over together?
A. We talked about it.
Q. Did you talk about that thirty year provision?
A. Yes.
Q. What did he say about it?
A. I think his idea in making that——
Q. (Interrupting.) No, beg your pardon—what did he say about it?
A. So that we would have something in our old age.
Q. He said that he wanted you to have something in your old age?
A. Yes, and in connection with that he mentioned fortunes which had been squandered.
Q. His idea was—oh well, that is what he said.

Mr. Lewis: That is all.

Redirect examination.

By Mr. Mullen:

Q. You have been asked about other doctors. Did you folks have some other doctors called in consultation when he was down in the hospital?
A. Well, I think there was another—let's see—Dr. Bridges.
Q. Was Dr. Condon called in, and Dr. Dunn and Dr. Detweiler?
A. Yes.
Q. There was a consultation of doctors at the hospital a little while before he died?
A. I don't know.
Q. Your mother would know about that, wouldn't she?
A. I don't know whether she does or not.
Q. But the point I inquired about was in regard to the doctors that waited on your father?
A. Only two that I know anything about, Dr. Holovtchinor and Dr. Edmiston.

Witness excused.

[fol. 79] ELIZABETH F. SHUKERT, one of the plaintiffs, is here called and sworn as a witness on behalf of the plaintiffs. Being examined in chief by Mr. Mullen, she testified as follows:

Q. What is your name?
A. Elizabeth F. Shukert.
Q. You are the widow of Gustave E. Shukert, are you?
A. I am.
Q. How old are you?
A. Fifty-four.
Q. How old was Mr. Shukert at the time he died?
A. He was fifty-six in March, the 22nd.
Q. How long had you folks been married?
A. Twenty-nine years.
Q. Have you always lived here from the time you were married?
A. Always in Omaha.
Q. During his lifetime, during his married life, was he engaged in the fur business?
A. All his married life, yes.
Q. Was he in business before that?
A. Yes, he was in the fur business here.
Q. You knew of his business in a general way, did you?
A. Yes, I was down there all the time, that is, the first part of it, the first years.
Q. When did you quit going down to the business place?
A. Why, about fifteen years ago, that is, regularly. I went down occasionally after that.
Q. Did you help in the business down here at 15th and Harney?
A. Yes, for about fifteen years regularly. Then otherwise I was there just when it was necessary and he needed some help.
Q. Tell us in a general way about your husband's health, what condition was it in?
A. Well, Mr. Shukert had a very nervous disposition and he naturally would over-do, I think. He did not take care of himself as he ought to, but he was always up in the morning about six o'clock, I know, and he always attended to his business.
Q. Now, then had he had some ailment, asthma or something like that for a good many years?
A. Yes, he was traveling and he wanted to make better time by taking a horse and buggy to a certain town and he got a very bad [fol. 80] cold. He came home and he had to doctor that cold.
Q. That was away back, was it?
A. Yes, that was—well, that must have been about, I should say, about seven or eight years before he died that he had that awful bad cold.
Q. Well now, you speak of traveling: did he travel around through the state selling furs and buying them?
A. Yes, he sold coats at that time, manufactured gents fur coats.
Q. Now did that asthmatic trouble continue on down for some time?
A. He always had asthma after that bad cold.

Q. Well now, was there anything so bad that it interfered with his working and attending to business?

A. No, only when he got a little cold it would be worse you know, otherwise it would be a little hard breathing, you know, but it did not interfere with his taking care of his business.

Q. Did he take care of his business right down to the time of his death?

A. Yes.

Q. Now do you know about the plan he had in mind about creating a trust when he sold this building over here?

A. Yes. When he came to Omaha he settled in business in that Ramge Block as it was called then, and the first time he was able to pay his rent six months ahead of time and get 3% off, he said, "Some day I will own this building," and, when he decided to sell the building he said, "Now we will take this building we worked so hard for and put this away for the children when they get older so that they will surely have something in their old age.

Q. Was that his intention and purpose for many years back?

A. He always wanted to have a trust of some kind so the children would have something in their old age.

Q. About how far back was it that he talked about that?

A. Oh, we talked about that for fully ten years before he died.

Q. Now do you know in a general way about his giving those options to Wear and Piatti?

A. Why yes, I knew about it.

Q. Did you know of the sale of the property finally to George and Company?

A. Yes, I had to sign the papers.

[fol. 81] Q. You signed those papers. At the time you signed them did you understand he was going to create a trust?

A. I did.

Q. Had you seen this proposed trust agreement here, this deed that was given finally?

A. Oh, yes.

Q. You signed it, didn't you?

A. I did.

Q. You went over it with your daughters and your husband, did you?

A. I went over it with my husband, yes.

Q. Did he talk it over with you?

A. Yes.

Q. You understood fully what had been done?

A. Yes.

Q. What was said at that time or any time prior thereto regarding his making—or contemplating his death. Was there anything said about that?

A. Oh no, he always thought he would be an old gentleman.

Q. Was there anything said there about it any time?

A. Never mentioned his death.

Q. Was there anything said that indicated to you that he was disposing of his property because of his contemplated death?

A. No, that had nothing to do with it whatever.

Q. Do you know in a general way of the size of his estate?

A. Why, yes.

Q. You knew about his other properties?

A. Yes, he had plenty so he did not have to worry about putting this much aside.

Q. Was there anything said there by him or you about creating this trust for the purpose of evading the estate taxes?

A. No, the taxes were never mentioned. He did not think about that.

Q. Did you think about that?

A. No, I did not. We thought about the estate and about settling it on the children but we did not even think about the taxes. I didn't even know about it.

Q. When did he really get in a serious way as far as you know?

A. Well, that was in August that he was real bad, you know, at home.

[fol. 82] Q. Well, you know about the time he went to Dr. Holovtchinor?

A. Yes, I can't remember the date, but it was either in July or around the first of August.

Q. You learned then that he was ill, did you, seriously ill?

A. Why yes, we knew that he had to take care of himself

Q. And then later on he went to the hospital?

A. He was at home for a while during August, and he said, "If I could only get up I know I would be all right." He said, "The doctor is just keeping me home."

Q. Well, he went down to attend to business did he, after a while?

A. Yes, he went down and had a talk at the store and he didn't want to go to the hospital, so he called in Dr. Edmiston to see what he would recommend, because he was our old doctor, and he said, yes, it would be better if he would go to the hospital.

Q. And then after consulting with Dr. Edmiston and Dr. Holovtchinor, he went to the hospital, did he?

A. Yes.

Q. Prior to that time what doctor waited on him?

A. Dr. Edmiston did years ago, and Dr. Holovtchinor was in the building and so any little thing there in the building, when he had a cold, he went to Dr. Holovtchinor.

Q. Well, was there any doctor taking care of him for years?

A. No, only Dr. Edmiston.

Q. He took care of him whenever he needed a doctor?

A. Yes.

Q. After he went to the hospital was there any consultation of doctors?

A. Yes, they had several doctors in consultations.

Q. What doctors were they?

A. Well, there was Dr. Detweiler—he is dead now—and Dr. Dunn was called, and Dr.——

Q. (Interrupting.) Dr. Condon?

A. Well, I can't tell you just who the other doctor was, but there was another doctor called.

Q. Was it Dr. Bridges?

A. Dr. Bridges.

Q. You called in the other doctors to see if there was anything you could do?

A. Why yes, we did everything in the world.

Q. About how long after he went to the hospital did you learn that he was in a serious condition?

[fol. 83] A. Well, of course he knew he was sick when he had to go to the hospital but he got worse right along, but he walked into the hospital.

Q. Where did you take him when he had this attack?

A. That was down in the store. You know he was sick at home about three weeks and went down to the store about a week or so and then this attack was down in the store and then he went to the hospital after that.

Q. What was this attack?

A. He fainted because of the heart trouble, I think.

Q. He had some sort of a fainting spell, did he?

A. They told me he had a heart attack.

Q. He was taken home, was he?

A. Dr. Holovtchinor brought him home, and the next day he went down to the hospital.

Q. And he was in the hospital then from that time until his death?

A. Yes.

Q. Now, did you see him from time to time in the hospital?

A. Oh yes, I was there every day.

Q. About how long before his death did he find out himself how serious he was?

A. Well, he said he wasn't getting any better, but he didn't say that he feared death because he didn't mention it to me even then.

Q. You learned of his preparation of a Will down at the hospital?

A. Yes.

Q. Did he tell you about that?

A He told me he had called Mr. Herdman to get the Will fixed up.

Q. Now then, had he ever drawn any will before?

A. Well, I think there was an old, old will that was made probably five years after we were married. We made a joint Will or something, I can't remember just what year, but it was an old Will.

Q. Away back?

A. Away, way back.

Q. That was before you had much property, was it?

A. Yes, we didn't have very much then.

Q. He made most of this property after he was married, did he?

A. Yes.

Q. Practically all of it?

A. Yes, made it nearly all.

Q. Now did he discuss with you or talk with you any time about making a Will?

A. No, he always thought he had plenty of time making a Will.

[fol. 84] Q. But finally—when this Will was made, was that the first time you talked of it?

A. When he was in the hospital. Otherwise he never mentioned it.

Q. Did he talk with you some about this Will before he made it?

A. No. He said I could see Mr. Herdman because he had mentioned the terms to him and he was to draw up a Will.

Cross-examination.

By Mr. Lewis:

Q. Mr Shukert never said anything to you about an estate tax or inheritance tax?

A. No, he did not.

Q. Never said anything to you about his health at all?

A. Why, he would get a cold or something like that but he never said he was dangerously sick.

Q. I understand, but did he ever talk with you about the state of his health?

A. No.

Witness excused.

OFFERS IN EVIDENCE

Mr. Mullen: Plaintiffs now offer in evidence the expectancy of life for persons of the age of fifty-six according to the Actuary Table, The American Table, the Carlisle Table and the Southhampton Table, which are respectively as follows:

Actuary Table	16.22 Years.
American Table	16.72 years.
Carlisle Table	16.89 years.
Southhampton Table	15.10 years.

The statement above made is received in evidence without objection and is made a part of this record.

Mr. Mullen: Plaintiffs now offer in evidence the additional part of Plaintiffs' Exhibit 3, being the photostatic copies of the Return, which includes Plaintiffs' Exhibit 1 which was offered in evidence this morning. Of course I do not re-offer Plaintiffs' Exhibit 1, but the remaining part of Plaintiffs' Exhibit 3 I now offer in evidence.

That portion of Plaintiffs' Exhibit 3 referred to in the above offer is received in evidence without objection, is hereto attached, made a part of this record and is as follows:

(Here follows Plaintiffs' Exhibit 3, marked side folio pages 85 and 86)

[fol. 87] To Be Filed In Duplicate

Treasury Department
U. S. Internal Revenue
Form 706—Revised November, 1919

Collection District.....
Date Filed.....

Receives
Jul 6 1922
State of Nebr.
S

Assessment List. Form 23 A.
7- 6- 22
(Month) (Year)
3 6
(Page) (Line)
Gross tax, $.....Paid 26 921.51
.....
Interest, $.....Paid .....

Additional Tax Assessed

Assessed May 1923
Additional Tax, $13,685.97 Paid 6/28/23
Interest—$..... Paid.....
.....
Page 6 Line 4
By RKL Date May 28, 1923

Audit and Claim Record.
Received.....
Amount, $.....
Allowed, $.....
Rejected, $.....
By..... Date.....
4-45

FSC
Per VMP

Return for Federal Estate Tax

An Itemized Inventory, by Schedule, of the Gross Estate of the Decedent, with Legal Deductions

Decedent's name: Gustave E. Shukert. Date of death: Sept. 29, 1921.
Residence at time of death: Omaha, Nebraska.

[fol. 88] General Instructions—Read with Care

1. Penalties.—For failure to file return when due, a fine not exceeding $500, or 25 per cent added to the tax, or both. For know-

United States of America.

Plaintiff's Exhibit 3. C.W.P.

Treasury Department,

April 16, 1924

Pursuant to Section 882 of the Revised Statutes

I hereby certify that the annexed are true copies of Return for Federal Estate Tax including Trust Agreement and Affidavits, filed by Elizabeth F. Shukert, Executor of the Estate of Gustave E. Shukert, deceased, Omaha, Nebraska; Copy of letter, dated May 25, 1923, to Elizabeth F. Shukert, et al from Deputy Commissioner R. M. Estes, on file

[illegible] document.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury;

Acting Assistant Secretary of the Treasury.

85-86

TREASURY DEPARTMENT,
CHIEF CLERK AND SUPERINTENDENT.
Form 66.
Ed. 5,000—Jan. 31-19

ingly making a false statement in this return, a fine not exceeding $5,000, or imprisonment, or 50 per cent added to the tax, or any or all of the three.

2. This return is required for the estate of every resident decedent whose gross estate exceeds $50,000, and for the estate of every nonresident decedent at any part of whose gross estate is situated in the United States. The term "United States" used in this form means only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

3. This return is due one year after the date of death, and must be filed with the collector of the district in which the decedent had his permanent residence at the time of death, or, in the case of a nonresident, with the Commissioner of Internal Revenue, Treasury Department, Washington, D. C.

4. Regulations No. 37, Revised, 1919, should be carefully studied before making out this return.

5. All papers used in preparing the return should be carefully preserved for reference or inspection. All estate tax returns are verified by an internal-revenue officer before the tax is determined by the Bureau.

6. If the decedent left a will, a certified copy must be filed in duplicate with the return.

There should be filed in duplicate and as a part of the return such supplement data and statements as may be necessary to substantiate the return and establish the correct tax.

In the case of the estate of a nonresident, there should be filed—

(1) Certified copy of will, if decedent died testate, or of each will if decedent left more than one, to govern in different jurisdictions.

(2) A certified copy of inventory of the complete gross estate, whether situated within or without the United States. Separate schedules should be made for property within and without the United States, respectively.

(3) If any deduction is claimed, a certified copy of schedule of debts and expenses allowed.

[fol. 89] 7. This form consists of cover sheets, general information sheet, and thirteen schedules. Care should be taken to see that the return is filed complete and that all schedules are included in the proper order.

The inventory of the gross estate must be set forth upon the schedules provided, and may not be attached in the form as an exhibit.

8. The questions asked under each schedule should be specifically answered, and if the decedent owned no property of any class specified under the schedule, the word "None" should be written across the schedule.

9. If there is not sufficient space for all entries under any schedule, use additional sheets of the same size, numbering them consecutively as follows: Schedule A-1, A-2, etc., and insert them in the proper order in the return.

10. Any property owned jointly or as tenants in the entirety, should be entered under the schedule for the particular kind of property involved, with a statement of the origin, nature, and extent of the interest. Jointly owned real estate, for example, should be entered on Schedule A.

11. Where decedent died subsequent to February 24, 1919, property identified as received from an estate taxed within five years, and subsequent to October 3, 1917, or identified as exchanged for such property, must be entered in Schedule G exclusively and not under any other schedule, whether real estate or other property.

12. Further instructions will be found under each schedule. Returns not in accordance with the instructions upon this form will not be accepted. C 12

Estate of Gustave E. Shukert, District of Nebraska

General Information Sheet

The information called for on this page is necessary for purposes of record and verification. Fill out all blanks carefully.

The name of the decedent's legal heirs and next of kin are required whether the decedent left a will or not. If the will names more than ten, only the names of the ten principal beneficiaries are required.

State whether decedent died testate or intestate. (Answer.) Testate.

Permanent residence at time of death. Omaha, Nebraska.

Actual place of death. Omaha, Nebraska. Age at death. 56 years.

Business or employment. Furrier and Investor.

Business address. 401 South 15th Street, Omaha, Nebraska.

[fol. 90] Heirs-at-law, Legatees, and Beneficiaries

Name	Relationship	Address
Elizabeth F. Shukert	Widow	2228 Larimore Ave. Omaha, Neb.
Isabel C. Shukert	Daughter	" " " " "
Flora G. Shukert	Daughter	" " " " "
Gustave E. Shukert, Jr.	Son	" " " " "
United States Trust Company of Omaha, Nebraska, Trustee	None	1612 Farnam St. Omaha, Neb.

(If more space is needed, insert additional sheets of same size.) C2

(Here follows Schedules A, B, B-1, C, C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, C-9, C-10, C-11, C-12, marked side folio pages 91 & 92, 93 & 94, 95 & 96, 97 & 98, 99 & 100, 101 & 102, 103 & 104, 105 & 106, 107 & 108, 109 & 110, 111 & 112, 113 & 114, 115 & 116, 117 & 118, 119, 120 & 121.)

GROSS ESTATE.
SCHEDULE A.
Real Estate.

Instructions.

Real estate should be so described that it may be readily located. The legal description is not required unless necessary to show the exact location. The character of the buildings should be stated and the character and area of unimproved land. For location, such details as the following may be necessary:

City or town property.—Street and number, ward, map or subdivision, block and lot, etc.

Rural property.—County, township, range, block and lot, street, landmarks, etc.

If any item of real estate is subject to mortgage, the unpaid balance of the mortgage should be shown under "Description." The full value of the property and not the equity must be extended in the value column. The mortgage must be deducted under Schedule J of this return.

All rents accrued and unpaid should be apportioned to the date of death whether due at that time or not.

For further instructions see Article 13 et seq. Regulations No. 37, Revised, 1919.

Did the decedent, at the time of death, own any real estate? (Answer "Yes" or "No.").....

Item No.	Description of real estate	Assessed value for year of decedent's death.	Actual value on day of decedent's death.	Accrued rents.
		$	$	$
1.	North 44 ft. Lot 5 and North 44 ft of West ½, Lot 6, Block 139, original plat, Omaha, Nebraska. 44x99 ft. Improvements, 3 story brick building.	195,000.00	250,000.00	√
2.	Lots 5, 6, 7, Ford's Saratoga Addition to Omaha, Nebraska, family homestead. Improvements, 1½ story frame dwelling, upwards of 20 years old, covered with stucco a few years ago.	4,600.00	6,000.00	√
3.	West 142 ft. Lot 12, Block 12. Hanscom Place Addition to Omaha, Nebraska, unimproved.	2,500.00	5,000.00	√
				√ √
	Total.....		$261,000.00	261,000.00
	Grand Total.....			$261,000.00 √

(If more space is needed, insert additional sheets of same size.)

91 1 92

SCHEDULE B.
Stocks and Bonds.

Instructions.

Give a complete and adequate description of all securities, as follows:

Stocks.—State the number of shares, exact title of corporation, common or preferred, par value, and quotation at which returned. If a listed security, state principal exchange upon which sold. If unlisted, show the address of the issuing company.

Examples: 10 shares American Car & Foundry Co., preferred, par $100, at 98, New York Exchange.

10 shares Eagle Manufacturing Co., Red Bank, N. J., common, par $25, at 30, unlisted.

Bonds.—State quantity and denomination, exact title, kind of bond, interest rate, and due dates. State the exchange upon which listed or the address of company, if unlisted.

Example: Ten $1,000 Baltimore & Ohio Railway Co. first mortgage 4 per cent registered 50-year gold bonds, due 1948, January, April, July, and October, at 96, New York Exchange.

Listed stocks and bonds should be returned at the mean between the high and low sale prices on the day of death; if there was no sale on the day of death, the nearest sale price, either before or after death, and within a reasonable period thereof, should be taken.

Unlisted securities which are actively dealt in should be appraised upon the basis of last sales prior to death. The source of the quotation should be stated.

Inactive stock and stock in close corporations should be appraised upon the basis of net assets of the company at the time of death and its earning capacity during the five preceding years. If such stock forms a material part of the estate there must be submitted copies of statement of assets and liabilities as of the date of death and for each of the five years preceding death, and a statement of net earnings per year for the same period.

Securities returned as of no value, nominal value, or obsolete should be listed last, and the address of the company and the State and date of incorporation should be stated, if obtainable from the certificate. Copies of correspondence or statements of reasons for return at no value should be retained for inspection.

Interest on bonds should be apportioned to the date of death computed upon the basis of 360 days to the year and returned in interest column. Dividends upon stock declared prior to death, and payable after date of death, must be returned separately unless reflected in the price at which the stock is returned.

In nonresident estates the actual depository on date of death on all bonds should be shown.

For further instructions see Article 15 et seq., Regulations No. 37, Revised, 1919. Did the decedent own any stocks or bonds? (Ans.

Item No.	Description.	Value on day of death.	Interest or dividends.	Quotation	Extension	Interest	
1.	200 shares Nebraska Cattle Loan Co., Omaha, Neb. common, par value $100, at $90	$ 18000.00 √	$ None	@ 90 J F M.			√
2.	$6000 Federal Farm Loan Bonds—4½%—due 1937; interest May 1 & Nov. 1—par	6000.00 √	113.25 √	Par "		113.25Bm	√
3.	$1000 U. S. of A. War Savings Certificate, Value as per Government tables	912.00 √		4.56Bm	912 √		√
4.	$20,000 Omaha & Council Bluffs Street Railway Co. 1st consolidated mortgage gold bonds, 5%, due Jan. 1, 1928; Interest Jan 1st and July 1st, at $75. Market price quoted by Burns-Brinker Co., Omaha	15000.00 √	249.99 √	@ 75 Bm		249.99Bm	√
5.	$20,000 The People of Porto Rico, 4½%, Gold Loan of 1920; due 1/1/38 and 1/1/39; Interest Jan. 1st and July 1st, at 92.25. Market price quoted by Burns-Brinker Co., Omaha, Nebr.	18450.00 √	225.00 √	@92¼J F M.		225.Bm	√
	Total.....	$ 58362.00 √	$ 588.24 √				
	Grand Total.....		$.....				

(If more space is needed, insert additional sheets of same size.) 2—9289

93-94

Item No.	Description	Value on day of death	Interest or Dividends	Quotation	Extension	Interest		
								11.05 8.83
								3315 8840 8840
		55362.00	588.24					
6.	$11,050 U. S. of A. Liberty Loan of 1917, due 1947—June & December, at 88.26, New York Exchange	9752.73 √	113.87 √	88.30Bm	9757.15 √	113.87Bm		9757.15
7.	$2,050 U. S. of A. 1st Liberty Loan Converted 4¼% Gold Bonds, due 1932-47—June & December, at 90.70. New York Exchange	1859.35 √	25.65 √	90.69Bm	1859.15 √	25.65Bm		906.9 205
8.	$8,100 U. S. of A. 2d Liberty Loan Converted 4¼% Gold Bonds, due 1927-42—May & November, at 90.32, New York Exchange	7315.92 √	130.99 √	90.37Bm	7397.97 √	130.99Bm		45345 18138
9.	$10,400 U. S. of A. 3d Liberty Loan 4¼% Gold Bonds, due 1928—March & September, at 93.84, New York Exchange.	9759.36 √	17.17 √	" 93.84 Bm	9759.36 √	17.17Bm		1859.145 903.7 8.1
10.	$5,000 Armour & Company 7% 10-year Convertible Gold Notes, due 7/15/30—July and January, at 99. Market price quoted by Burns-Brinker Co., Omaha, Nebr.	4950.00 √	73.89 √	@ 99 Bm	49.50 √	73.89 Bm	938.4 104 37536	9037 72396 731997
11.	$5,000 Morris & Company 7½% 10-year Sinking Fund Gold Notes, due 9/1/30—March & September, at 98.25. Market price quoted by Burns-Brinker Co., Omaha, Nebr.	4912.50 √	29.16 √	@98.25 Bm	4912.50 √	29.16Bm	9384 975936 √ ~~9380~~	
12.	$7,805.26 City of Omaha, Nebraska, Sewer District No. 654—Warrants; Interest 7% from 2/17/21. Par.	7805.26 √	330.94 √	O. K. J F M	7805.26 √	330.94Bm	50 —	
		104717.12	1318.91				97 4940	
	Grand Total		√106036.03 C5				C5	

95-96

SCHEDULE C.

Mortgages, Notes, Cash, and Insurance.

Instructions.

The four classes of property on this schedule should be listed separately in the order given.

Mortgages.—State (1) face value and unpaid balance, (2) date of mortgage, (3) name of maker, (4) property mortgaged, (5) interest dates and rate of interest. For example: Bond and mortgage for $5,000, unpaid balance $5,000; dated January 1, 1910, John Doe to Richard Roe; premises 22 Clinton St., Newark, N. J.; interest payable at 6 per cent per annum January 1 and July 1; interest paid to January 1, 1912.

Notes, Promissory.—Give similar data.

Cash in Possession.—List separately from bank deposits.

Cash in Bank.—Name bank and amount in each bank and give serial number of account. Include accrued interest in income column, or indicate if included in total on deposit.

Insurance.—The proceeds of all life insurance to whomsoever payable must be returned regardless of value. Insurance payable to executor must be returned first. State (1) name of company, (2) number of policy, (3) name of person receiving insurance. Include full amount received.

Important.—If there is insurance payable to beneficiaries other than the executor, deduction may be taken at bottom of this page equal to the amount returned for such insurance, but not exceeding $40,000.

For further instructions see Article 34 et seq., Regulations No. 37, Revised, 1919.

(1) Did the decedent, at the time of his death, own any mortgages, notes, or cash? (Answer "Yes" or "No.") .....Yes.....
(2) Was any insurance payable on life of decedent to executor? (Answer "Yes" or "No.") .....Yes.....
(3) Was any insurance payable on life of decedent to beneficiaries other than executor? (Answer "Yes" or "No.") ....Yes....

Item No.		Value on day of death.		Income accrued to date of death.	
1.	Cash on Hand	$ 295.93	√		
2.	Cash on Deposit—1st Natl Bank of Omaha.	1,765.47	√		
3.	Insurance payable on life of decedent to estate, New York Life Insurance Company Policy #3822114.	2,163.97	√		
4.	Insurance on life of decedent payable to Elizabeth F. Shukert, his widow. No other beneficiary receiving any such insurance				
	Policies of Union Central Life Ins. Co.				
	#385068 — $5000)				
	#429411 — 5000)	781.56	√		
	#483497 — 10000)				
	Policy #587441, N. Y. Life Ins. Co. of N. Y.	2,100.00	√		
	Policy #96497, Aetna Life Insurance Co.	10,000.00	√		
	Policy #254443, Phoenix Life Ins. Co.	5,507.66	√		
	Policy #464430, Northwest Mut. Life Ins. Co	5,230.00	√		
	Less amount of insurance payable to beneficiaries other than the executor not in excess of $40,000	$ 40,000.00	√	.....√	
	Total Taxable	$ 8,845.59	√	$ 8,845.59	
	Grand Total			$	

97 - 96

Mortgages.

Item & No.	Description	Value on day of death	Income accrued to date of death	Quotations	Extensions	Interest	
1.	Bond and Mortgage for $5000, unpaid balance $5000, dated 3/26/17, Louis and Ruth Anderson; premises NW¼ Sec. 17, Twp. 95, R. 34, W. 5, Palo Alto County, Iowa. Interest payable at 6% per annum, April 1st; Interest paid to 4/1/21	5000.00 √	148.60 √			148.60Bm	√
2.	Bond and Mortgage for $30,000, unpaid balance $30,000; dated 5/2/21, Alamito Dairy Co.; premises SW corner 26th & Leavenworth, Omaha, Nebr. Interest payable at 8% per annum, May 2d and Nov. 2d; interest paid to May 2, 1921	30000.00 √	979.68 √			979.68 Bm	√
3.	Bond and Mortgage for $5000; unpaid balance $5000; dated 9/15/19, Wm. R. Batey; premises N½-NW¼ & SW-NW Sec. 27, Twp. 3, R. 73, Costilla Co., Colo. and tracts adjoining. Interest payable at 6% per annum, Mar. 1st; interest paid to Mar. 1, 1921.	5000.00 √	174.05 √			174.05 Bm	√
4.	Bond and Mortgage for $3000; unpaid balance $3000; dated 7/26/20, John Burry; premises all west of C. B. & Q. R. R. in SW¼ Sec. 28, Twp. 22, R. 50, Morrill Co., Nebr. Interest payable 7% per annum, July 26th and Jan. 26th; interest paid to July 26, 1921	3000.00 √	37.38 √			37.38 Bm	√
5.	Bond and Mortgage for $3000; unpaid balance $3000; dated 7/26/20, John Burry; premises NE¼ Sec. 29, Twp. 26, R. 49, Box Butte Co., Nebr. Interest payable 7% per annum, July 26th and Jan. 26th; interest paid to July 26, 1921	3000.00 √	37.38 √			37.38 Bm	√
6.	Bond and Mortgage for $2000; unpaid balance $2000; dated 12/15/20, Chas. Burry; premises E½-NE Sec. 8 and SE¼ Sec. 8; W½-NW¼, SW¼ and S½-SE Sec. 9; N½-NE Sec. 17, T. 21, R. 50, Morrill Co., Nebr. Interest 7%, 6/15 and 12/15; Interest paid to 6/15/21.	2000.00 √	40.60 √			40.60 Bm	√
	For'd.	48000.00	1417.69 C7				C7

99-100

SCHEDULE C-2.

Item No.	Description	Value on day of death	Income accrued to date of death	Quotation	Extension	Interest	
		49000.00	1417.69				
7.	Bond and Mortgage for $5600; unpaid balance $5600; dated 5/1/20, M. B. & B. C. Buell; premises E½ Sec. 3, T. 114, R. 76, Sully Co., S. D. Interest payable 6% per annum, May 1st; Interest paid to 5/1/21.	5600.00 √	138.92 √			138.92 Bm	√
8.	Bond and Mortgage for $10,000; unpaid balance $10,000; dated 1/31/21, Walter L. Beavers; premises 624 acres in Sec. 36, Twp. 99, R. 49, Union Co., S. D. Interest payable 7% per annum, Sept. 1st and Mar. 1st; Interest paid to 9/1/21	10000.00 √	53.67 √			53.67 Bm	√
9.	Bond and Mortgage for $2000; unpaid balance $992.86; dated 7/1/18, Fred Busch; premises SE Corner 14th & Pacific Sts., Omaha, Nebr. Interest payable 6% per annum payable monthly; interest paid to 10/1/21.	992.86 √					
10.	Bond and Mortgage for $2500; unpaid balance $2500; dated 11/1/20, John L. Carnarsky; premises SW¼ Sec. 32 and SE¼ Sec. 31, Twp. 23, R. 51, Morrill Co., Nebr. Interest payable 7% per annum, May 1st and Nov. 1st; interest paid to 5/1/21.	2500.00 √	72.39 √			72.39 Bm	√
11.	Bond and Mortgage for $5000; unpaid balance $5000; dated 1/10/18, H. C. Casselman; premises E½&NW¼ Sec. 31, Twp. 12, R. 62, Weld Co., Colo. Interest payable 6% per annum, Jan. 10th; interest paid to Jan. 10, 1921.	5000.00 √	215.10 √			215.10 Bm	√
12.	Bond and Mortgage for $20,000; unpaid balance $20,000; dated 5/10/17, Collis Products Co.; premises 907-909-911 Dodge St., Omaha, Nebr. Interest payable 5% per annum, May 1st and Nov. 1st; Interest paid to 5/1/21.	20000.00 √	413.59 √			413.59 Bm	√
	For'd.	92092.86 √	2311.36 CS				CS

101-102

Item No.	Description	Value on day of death.	Income accrued to date of death	Quotation	Extension	Interest	
		92002.86 √	2311.36 √				
13.	Bond and Mortgage for $1000; unpaid balance $1000; dated 6/16/19, John Davis; premises SW¼ Sec. 24, Twp. 75, R. 52, Lincoln Co., Colo. Interest payable 7% per annum, June 16th and Dec. 16th; interest paid to 6/16/21	1000.00 √	20.12 √			20.12 Bm	√
14.	Bond and Mortgage for $10,000; unpaid balance $10,000; dated 2/5/21, Aaron B. Detweiler; premises N½ Sec. 33, Twp. 2, R. 73, Costilla Co., Colo. Interest payable 7% per annum, 3/1 and 9/1; interest paid to 9/1/21.	10000.00 √	53.68 √			53.68 Bm	√
15.	Bond and Mortgage for $6000; unpaid balance $6000; dated 5/23/21, Marcia E. and C. O. Edgerton; premises SE¼ Sec. 36, Twp. 2, R. 74 and NW-NE Sec. 1, Twp. 1, R. 74, Costilla Co., Colo. Interest payable 7% per annum, 5/23 and 11/23; interest paid to 5/23/21.	6000.00 √	148.35 √			148.35 Bm	√
16.	Bond and Mortgage for $7000; unpaid balance $7000; dated 5/23/21, J. Glenn Edgerton; premises SW¼ Sec. 6, Twp. 1, R. 73 and NE-NE Sec. 1, Twp. 1, R. 74, Costilla Co., Colo. Interest payable 7% per annum 3/1 and 9/1; interest paid to 9/1/21.	7000.00 √	37.58 √			37.58 Bm	√
17.	Bond and Mortgage for $4000; unpaid balance $4000; dated 2/16/20, Harold Gunvordahl; premises NE¼ Sec. 26, Twp. 95, R. 72, Gregory Co., S. D. Interest payable 6% per annum, 3/1; interest paid to 3/1/21	4000.00 √	139.39 √			139.39 Bm	√
18.	Bond and Mortgage for $2500; unpaid balance $2500; dated 3/7/19, Edson A. & Benj. I. Gale; premises 1280 acres in Twp. 31, R. 34 & 35, Cherry Co.,Nebr. Interest payable 8%, 3/7 and 9/7; interest paid to 9/7/21	2500.00 √	12.05 √			12.05 Bm	√
	For'd.	122502.86 √	2722.53 √ C9				C9

SCHEDULE C-4.

Item No.	Description	Value on day of death.	Income accrued to date of death	Quotation	Extension	Interest	
		122592.86	2722.53				
19.	Bond and Mortgage for $4000; unpaid balance $4000; dated 3/1/20, Henrik L. Hansen; premises W½-SW¼ & E½-NW¼ Sec. 27, Twp. 2, R. 73, Costilla Co., Colo. Interest payable 7½%, 3/1; interest paid to 3/1/21.	4000.00 √	174.24 √			174.24 Bm	√
20.	Bond and Mortgage for $3500; unpaid balance $3500; dated 1/12/20, Edw. T. Hayden; premises SE¼ Sec. 20, Twp. 112, R. 73, Hyde Co., S. D. Interest payable 6%, 3/1; interest paid to 3/1/21	3500.00 √	121.96 √			121.96 Bm	√
21.	Bond and Mortgage for $3000; unpaid balance 3000; dated 8/1/17, L. A. Henderson; premises Lot 4 and SW-NW Sec. 1, Twp. 49, R. 73, Big Horn Co., Wyo. Interest payable 6%, 8/1; interest paid to 8/1/21	3000.00 √	29.09 √			29.09 Bm	√
22.	Bond and Mortgage for $3400; unpaid balance $3400; dated 8/31/17; Rudolph W. Holse; premises NE-NW & S½-NW Sec. 8, Twp. 2, R. 73, Costilla Co., Colo. Interest payable 6%, 1/1; interest paid to 1/1/21.	3400.00 √	151.45 √			151.45 Bm	√
23.	Bond and Mortgage for $6000; unpaid balance $6000; dated 12/1/16, H. L. Huffaker; premises NW¼ Sec. 35, Twp. 3, R. 73, Costilla Co., Colo. Interest payable 6%, 4/1; interest paid to 4/1/21.	6000.00 √	178.52 √			178.52 Bm	√
24.	Bond and Mortgage for $1200; unpaid balance $1200; dated 3/1/19, Benj. E. Hall; premises NW-NW Sec. 8, Twp. 2, R. 73, Costilla County, Colo. Interest 6%, 3/1; interest paid to 3/1/21	1200.00 √	41.81 √			41.81 Bm	√
	For'd.	143692.86 √	3419.60 √				
		C10					C10

105—106

Item No.	Description	Value on day of death.	Income accrued to date of death.	Quotation	Extension	Interest	
		143692.86	3419.60				
25.	Bond and Mortgage for $7000; unpaid balance $6000; dated 11/1/15, Henry Hardy; premises part of Lot 7 Blk. 78, South Omaha, Nebr. Interest 5½%, 5/1 and 11/1; interest paid to 5/1/21	6000.00 √	137.01 √			137.01 Bm	√
26.	Bond and Mortgage for $7452; unpaid $7452; dated 3/1/18, J. C. Irwin, & J. E. Clayton; premises Sec. 5, NE¼ Sec. 6, N½ Sec. 8, Twp. 110, R. 76, Hughes Co., S. D. Interest 6% per annum, 3/1; interest paid to 3/1/21.	7452.00 √	259.49 √			259.49 Bm	√
27.	Bond and Mortgage for $4000; unpaid balance $4000; dated 1/14/21, Jaroso Academy Association; premises S½ of NE of NW; N½ of SE of NW; SE of NW of NW and NE of SW of NW, all Sec. 31, Twp. 1, R. 73, Costilla County, Colo. Interest payable 8%, July 14th and Jan. 14th; interest paid to 7/14/21.	4000.00 √	67.51 √			67.51	√
28.	Bond and Mortgage for $1600; unpaid balance $1600; dated 4/15/21, Otis W. Kepler; premises W½ of SW¼ Sec. 19, Twp. 1, R. 73, Costilla Co., Colo. Interest payable 8%, 4/15 and 10/15; interest paid to 4/15/21.	1600.00 √	58.55 √			58.55 Bm	√
29.	Bond and Mortgage for $18,000; unpaid balance $18,000; dated 12/1/20; J. R. Kelley; premises all Sec. 15; N½ & NW¼ of SW¼ Sec. 14; NE¼, E½ of NW¼, N½ of SE¼ and NE¼ of SW¼ Sec. 10; SW¼ Sec. 11, all in Twp. 22, R. 51, Morrill County, Nebr. Interest 7%, 6/1/ and 12/1; interest paid to 6/1/21.	18000.00 √	414.24 √			414.24 Bm	√
30.	Bond and Mortgage for $6000; unpaid balance $6000; dated 3/1/20; Hans Larsen; premises SE¼ Sec. 12, Twp. 2, R. 74, Costilla County, Colo. Interest payable 7%, 3/1; interest paid to 3/1/21.	6000.00 √	243.80 √			243.80	√
	For'd.	186744.86 √	4600.20 √ C11				C11

Item No.	Description	Value on day of death	Income accrued to date of death.	Quotation	Extension	Interest	
		136744.86	4600.20				
31.	Bond and Mortgage for $2500; unpaid balance $2500; dated 11/26/18; Hans A. Lauritsen; premises W½ of NE¼ Sec. 5, Twp. 1, R. 73, Costilla County, Colo. Interest payable 6%, 1/1; interest paid to 1/1/21.	2500.00 √	111.35 √			111.35 Bm	√
32.	Bond and Mortgage for $2200; unpaid balance $2200; dated 3/15/21; Chris Lauritsen; premises N½ of SE¼ Sec. 35, Twp. 1, R. 74, Costilla Co., Colo. Interest payable 8%, 3/15; interest paid to 3/15/21.	2200.00 √	138.85 √			138.85 Bm	√
33.	Bond and Mortgage for $5000; unpaid balance $5000; dated 3/16/20; Bernard Loman; premises 280 acres in Costilla County, Colo. Interest payable 8%, 3/16; interest paid to 3/16/21.	5000.00 √	215.72 √			215.72Bm	√
34.	Bond and Mortgage for $8000; unpaid balance $8000; dated 4/25/18; F. A. Jeffreyes; premises Lots 3 & 4 and SE of SW Sec. 19, Twp. 32, R. 16, and Lot 8 of Sec. 24, Twp. 32, R. 19, and NW of NW of Sec. 30, Twp. 32, R. 18, Rock County, Nebr. Interest payable 6%, 3/1; interest paid to 3/1/21	8000.00 √	278.78 √			278.78 Bm	√
35.	Bond and Mortgage for $10,000; unpaid balance $10,000; dated 10/12/20; Ben Levensky; premises Sec. 33, 34 & 35, Twp. 17, R. 54, Banner Co., Nebr. Interest payable 7%, 4/12 & 10/12; interest paid to 4/12/21.	10000.00 √	325.89 √			325.89 Bm	√
36.	Bond and Mortgage for $4500; unpaid balance $4500; dated 3/1/20, Lee Moats; premises S½ of N½ of SW¼ and S½ of SW¼ Sec. 18, Twp. 2, R. 73, Costilla Co., Colo. Interest payable 7%, 3/1; interest paid to 3/1/21.	4500.00 √	182.06 √			182.06 Bm	√
	For'd.	219944.86 √	5853.75 √ C12				C12

Item No.	Description	Value on day of death	Income accrued to date of death.	Quotation	Extension	Interest	
		219944.86	6853.75				
37.	Bond and Mortgage for $3000; unpaid balance $3000; dated 12/16/20, W. H. H. Miller; premises E½ of SW¼ Sec. 31, Twp. 1, R. 73, Costilla County, Colo. Interest payable 7%, 1/3 and 7/3; interest paid to 7/3/21.	3000.00 √	50.62 √			50.62 Bm	√
38.	Bond and Mortgage for $1400; unpaid $1000; dated 10/31/17, O. M. & J. B. McKitrick; premises Lot 5, Latey Sub and Lot 16, Blk. 18, Halcyon Heights, Omaha, Nebr. Interest payable 7%, 5/1 and 11/1; interest paid to 5/1/21.	1000.00 √	28.95 √			28.95 Bm	√
39.	Bond and Mortgage for $600; unpaid balance $600; dated 10/5/17; Herman B. Nelson; premises NW¼ Sec. 24, Twp. 2, R. 74, Costilla County, Colo. Interest payable 6%, 1/1; interest paid to 1/1/21/.	600.00 √	26.73 √			26.73 Bm	√
40.	Bond and Mortgage for $1400; unpaid balance $1400; dated 1/28/18; Thom. Orsland; premises NW¼ of NW¼ Sec. 26, Twp. 1, R. 74, Costilla County, Colo. Interest payable 7%, 3/4; interest paid to 3/4/21.	1400.00 √	56.00 √			56.00 Bm	√
41.	Bond and Mortgage for $1500; unpaid balance $1500; dated 2/10/17; John Oeschger; premises 1225 So. 27th St., Omaha, Nebr. Interest payable 6%, 2/1 and 8/1; interest paid to 8/1/21.	1500.00 √	14.54 √			14.54 Bm	√
42.	Bond and Mortgage for $2500; unpaid balance $2500; dated 3/25/16; Harry A. Phillips; premises N½ of NE¼ Sec. 27, Twp. 1, R. 74, Costilla Co., Colo. Interest Payable 6%, 1/1; interest paid to 1/1/21.	2500.00 √	111.35 √			111.35 Bm	√
	For'd.	229944.86 √	6142.03 √ C13				C13

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SCHEDULE C-6.

Item No.	Description	Value on day of death	Income accrued to date of death.	Quotation	Extension	Interest	
		220944.86 √	6142.03 √				
43.	Bond and Mortgage for $3000; unpaid balance $3000; dated 1/3/21; W. E. Preble; premises N½ Sec. 25, Twp. 30, R. 19, Rock County, Nebr. Interest payable 8%, 1/3 and 7/3; interest paid to 7/3/21.	3000.00 √	57.86 √			57.86 Bm	√
44.	Bond and Mortgage for $1000; unpaid balance $1000; dated 2/1/18; W. E. Preble; premises S½ of NW & N½ of SW Sec. 19, Twp. 31, R. 19, Rock Co., Nebr. Interest payable 6%, 2/1; interest paid to 2/1/21.	1000.00 √	39.43 √			39.43 Bm	√
45.	Bond and Mortgage for $1500; unpaid balance $1500; dated 6/1/20; Elisabeth Riley; premises So. 28' of No. 58' of W. 66½' Lot 28, McCandlish Place, Omaha, Nebr. Interest payable 7%, 6/1 and 12/1; interest paid to 6/1/21.	1500.00 √	34.51 √			34.51 Bm	√
46.	Bond and Mortgage for $6000; unpaid balance $6000; dated 2/14/18; R. A. Studley; premises NE¼ Sec. 35, Twp. 17, R. 18, Custer Co., Nebr. Interest payable 6%, 2/14 and 8/14; interest paid to 8/14/21.	6000.00 √	45.37			45.37 Bm	√
47.	Bond and Mortgage for $1800; unpaid balance $1800; dated 3/13/19; Edw. W. Sinnett; premises Lot 7, Glenwood Heights, Omaha, Nebr. Interest payable 6½%, 4/1 and 10/1; interest paid to 4/1/21.	1800.00 √	58.01 √			58.01 Bm	√
48.	Bond and Mortgage for $2760; unpaid balance $2760; dated 3/1/19; August Stanke; premises W½ Sec. 10, Twp. 113, R. 77, Sully Co., S. D. Interest payable 6%, 3/1; interest paid to 3/1/21.	2760.00 √	96.18 √			96.18 Bm	√
	For'd.	246004.86 √	6473.30 √ C14				C14

Item No.	Description	Value on day of death	Income accrued to date of death.	Quotation	Extension	Interest	
		248004.86	6473.39				
49.	Bond and Mortgage $800; unpaid balance $200; dated 11/1/17; Leonard L. Sprague; premises S½ of SW Sec. 13, Twp. 2, R. 74, Costilla Co., Colo. Interest payable 6%, 1/1; interest paid to 1/1/21.	200.00	8.91 √			8.91 Bm	√
50.	Bond and Mortgage for $3000; unpaid balance $3000; dated 8/27/21; Ella and W. E. Stockham; premises Lot 6, Block 2, Creighton's 2d Add., Omaha, Nebr. Interest payable 7%, 9/2 and 3/2; interest paid to 9/2/21.	3000.00	15.53 √			15.53 Bm	√
51.	Bond and Mortgage for $7000; unpaid balance $7000; dated 3/29/21; Mary Sherlock; premises Lots 3 & 4 and S½ of NW and SW¼ Sec. 1; E½ of NW¼, SW¼ and E½ Sec. 11; E½ of SE¼ of Sec. 10; NW¼ of NW¼ Sec. 14; E½ of NE¼ and NE of SE¼ Sec. 15; N½ of SW¼ Sec. 14, all Twp. 21, R. 50, Morrill County, Nebr. Interest payable 8%, 2/29 and 9/20; interest paid to 9/29/21.	7000.00					
52.	Bond and Mortgage for $7500; unpaid balance $7500; dated 8/1/19; G. L. Stout; premises 2568 acres in Garden County, Nebr. Interest payable 7%, 2/1 and 8/1. Interest paid to 8/1/21.	7500.00	84.84 √			84.84 Bm	√
53.	Bond and Mortgage for $2000; unpaid balance $2000; dated 11/27/17; Jas. F. McLoy; premises 640 acres in Arthur County, Nebr. Interest payable 6%, 6/1 and 12/1; interest paid to 6/1/21.	2000.00	39.44 √			39.44 Bm	√
54.	Bond and Mortgage for $1800; unpaid balance $1800; dated 8/15/17; W. S. Copley; premises 640 acres in Garden Co., Nebr. Interest payable 6%, 3/1 & 9/1. Int. paid to 9/1/21.	1800.00	8.28 √			8.28 Bm	√
	For'd.	267504.86 √	6630.39 √ C15				C15

SCHEDULE C-10.

Item No.	Description	Value on day of death	Income accrued to date of death.	Quotation	Extension	Interest	
		267304.86	6630.39				
55.	Bond and Mortgage for $1200; unpaid balance $1200; dated 6/30/17; Otto E. Wilson; premises 640 acres in Garden County, Nebr. Interest payable 6%, 1/1 and 7/1; interest paid to 7/1/21.	1200.00	17.75 √			17.75 Bm	√
56.	Bond and Mortgage for $1600; unpaid balance $1600; dated 10/2/17; Ernest Bruhaus; premises land in Grant and Garden Counties, Nebr. Interest payable 6%, 5/1 and 11/1; interest paid to 5/1/21.	1600.00 √	39.71 √			39.71 Bm	√
57.	Bond and Mortgage for $4500; unpaid balance $4500; dated 8/10/17; George W. Fowler; premises 320 acres of land in Sheridan Co., Nebr. Interest payable 6%, 9/1; interest paid to 9/1/21.	4500.00 √	20.71 √			20.71 Bm	√
58.	Bond and Mortgage for $10,000; unpaid balance $10,000; dated 8/16/17; Avery & Braden; premises 3680 acres of land in Garden and Arthur Counties, Nebr. Interest payable 6%, 9/1; interest paid to 9/1/21.	10000.00 √	46.00 √			46. Bm	√
59.	Bond and Mortgage for $16,000; unpaid balance $16,000; dated 3/1/20; William Wenske; premises W½ of SE¼ and S½ of SW¼ Sec. 31, Twp. 7, R. 7, Clay Co., Nebr. Interest payable 5%, 3/1 and 9/1; interest paid to 9/1/21.	16000.00 √	61.35 √			61.35 Bm	√
60.	Bond and Mortgage for $2300; unpaid balance $2300; dated 5/1/19; Geo. W. Wilson; premises Sec. 32, Twp. 31, R. 19, Rock County, Nebr. Interest payable 6%, 5/1 and 11/1; interest paid to 5/1/21.	2300.00 √	57.08			57.08 Bm	√
	For'd.	303104.86 √	6872.99 √ C16				C16

SCHEDULE C-11.

Item No.	Description	Value on day of death	Income accrued to date of death	Quotation	Extension	Interest	
		303104.86	6872.99				
61.	Bond and Mortgage for $2000; unpaid balance $2000; dated 10/24/19; J. E. Whitcomb; premises SW¼ Sec. 18, Twp. 14, R. 54, Kimball County, Nebr. Interest payable 6%, 10/1; interest paid to 10/1/20.	2000.00 √	119.33 √			119.33 Bm	√
62.	Bond and Mortgage for $10,000; unpaid balance $10,000; dated 2/28/20; George Zieg; premises SE¼ Sec. 30, Twp. 4, R. 6, Nuckolls Co., Nebr. Interest payable 6%, 3/1 and 9/1; interest paid to 9/1/21.	10000.00 √	46.00 √			46. Bm	√
63.	Bond and Mortgage for $9000; unpaid balance $9000; dated 6/24/18; J. B. Nichlos and J. W. Elwood; premises NE¼ Sec. 28, SE¼ Sec. 21, NW¼ of SW¼ Sec. 22, Twp. 33, R. 10, Boyd Co., Nebr. Interest payable 6%, 1/1 and 7/1; interest paid to 7/1/21.	9000.00 √	133.11 √			133. Bm	√
64.	Bond and Mortgage for $2500; unpaid balance $2500; dated 6/24/18; J. B. Nichlos and J. W. Elwood; premises E½ of SW¼ and SW¼ of SW¼ Sec. 21, Twp. 33, R. 10, Boyd Co., Nebr. Interest payable, 6%, 1/1 and 7/1; interest paid to 7/1/21.	2500.00 √	36.98 √			36.98 Bm	√
	Total	329604.86	7208.41				
	Grand Total		333813.27 √				
			C17				C17

SCHEDULE C-12.
Notes Promissory.

Item No.	Description	Value on day of death	Income Accrued to date of death.	Quotation	Extension	Interest	
1.	Promissory Note $30,000.00; Unpaid balance $30,000.00; dated 9/1/13; Ernest Shukert, Kansas City, Mo. Security: 700 shares capital stock Shukert Fur Co. Interest payable 6%, 3/1 and 9/1; interest paid to 9/1/21.	30,000.00	138.06 √			138.06 Bm	√
2.	Promissory Note $10,000.00; unpaid balance $10,000.00; dated 7/1/11; Ernest Shukert, Kansas City, Mo. Unsecured. Interest payable 6%, 7/1 and 1/1; interest paid to 7/1/21.	10,000.00	147.87 √			147.87 Bm	√
3.	Promissory Note $12,500.00; unpaid balance $12,500.00; dated 4/18/21; C. R. Wolfenden. Security: chattel loan. Interest payable and included in the principal sum of $12,500.00 to Oct. 18, 1921.	12,500.00	(52.06) †	—net accrued a/c			
4.	Promissory Note $4,500.00; unpaid balance $4,500.00; dated 5/21/21; H. E. Reavis. Security: chattel loan. Interest payable and included in the principal sum of $4,500.00 to Oct. 26, 1921.	4,500.00	(26.63) †	—net accrued a/c			
5.	Promissory Note $400.00; unpaid balance $400.00; dated 1/8/21; J. W. Good. Unsecured. Interest 7% from 9/8/21.	400.00	1.69 √			1.69 Bm	
	Total	57,400.00	208.93 √				
	Grand Total		57608.93 √				

Summary Schedule C

" C-1-c11	8,845.30 √
" C12	333,813.27 √
	57,608.93 √
Grand Total Schedule C	400,267.79 √

C18 C18

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[fols. 122 & 123] Estate of Gustave E. Shukert, District of Nebraska

SCHEDULE D

Other Miscellaneous Property

Instructions

Under this schedule include all items of gross estate not returned under another schedule, including the following: Debts due the decedent; interests in business; claims, rights, royalities, and pensions; leases, judgments, choses in action, shares in estates of decedents or trust funds; transfer value of fire and other protective insurance; household goods and personal effects, including wearing apparel; farm products and growing crops; live stock, automobiles, etc.

When an interest in a copartnership or unincorporated business is returned, submit in duplicate statement of assets and liabilities as of date of death and for the five years preceding death, and statement of the net earnings for the same five years. Good will must be accounted for.

In listing automobiles give make, model, and year.

Did the decedent, at the time of his death, own any interest in a copartnership or unincorporated business? (Answer "Yes" or "No.") Yes.

Did the decedent, at the time of his death, own any miscellaneous property not returnable under any other schedule? (Answer "Yes" or "No.") Yes.

Item No.	Description	Value on day of death	Accrued income
1.	Debts owing decedent—bills receivable	$12,149.41√	$.....
2.	Household Goods	500.00√	.....
3.	Merchandise and Fixtures on hand	9,000.00√	.....
	Storage charges accrued	1,769.00√	.....
	Amount due on repair "jobs"	10,373.45√	.....
	See affidavit of Isabel C. Shukert for detail of said items.		
	Total	$33,791.86	$.....
	Grand Total		$33,791.86

(If more space is needed insert additional sheet of same size.)

D 5 C19

STATE OF NEBRASKA,
County of Douglas, ss:

Isabel C. Shukert, being duly sworn, says that she is the daughter of Gustave E. Shukert, deceased, and one of the executrices of his last will and testament; that for a long time prior to the death of said Gustave E. Shukert, affiant assisted in the management and control of the manufacturing and retail fur business carried on by the decedent in the Railway Exchange Building, in Omaha, Nebraska; that affiant knew and was familiar with the plans, pur-
[fol. 124] poses and intentions of the decedent with reference to said business, and states that the decedent, her father, during the year 1920, when certain negotiations were on for the sale of said Railway Exchange Building, stated and declared to affiant that if the sale of said building was consummated, he would liquidate and close out his said fur business, and at the time of the sale of said Railway Exchange Building, in the month of January, 1921, affiant's father stated to her that having sold the building, he would close out and liquidate his said fur business as soon as same could reasonably be done, which would be by February first, 1922, and that for said purpose, in the sale of said building, he would reserve a lease covering that part of said Railway Exchange Building property occupied by him in carrying on said fur business, said lease to extend to and expire February first, 1922; affiant further states that her father, when on his death bed, instructed and directed affiant to close out and liquidate said fur business by February first, 1922, and in his last will and testament said decedent directed affiant and her mother, as the executrices of said will, to carry on and conduct business until February first, 1922, giving them power and authority to that end; affiant further states that the fur business as carried on by said Gustave E. Shukert was largely a seasonal business, that is, the heavy sales were during the Fall and Winter months, ending about the holidays; that during the remainder of the year, sales were comparatively light, and the business consisted almost entirely of job work in the way of repairs, alterations for customers, and making up and manufacturing into garments and fur articles for Fall and Winter trade, skins purchased for that purpose during the Spring and Summer months; that at the close of the season or year 1920, said Gustave E. Shukert carried over a certain stock of merchandise consisting of depleted lines and broken lots, and that during the Spring and Summer months of 1921, the said Gustave E. Shukert purchased only such skins and furs as were necessary to supplement and fill out the stock of merchandise so carried over so as to enable him to close out and sell said merchandise so carried over by February first, 1922; that the purchase of skins so made by said Gustave E. Shukert during the Spring and Summer of 1921 was far less than that purchased by him in prior years; that consistent with the intention and purpose of said Gustave E. Shukert to liquidate and close out his said fur business by February first, 1922, and in obedience to his injunction so to do given to affiant by her father on his death bed, the said business was liquidated and closed out by affiant and her mother as exec-

[fol. 125] utrices of the last will of said Gustave E. Shukert, during the month of January, 1922; that affiant is unable to make or have made, from the books of deceased, statements showing the assets and liabilities, and earnings of the fur business of said Gustave E. Shukert during the five years prior to his death; that attached to this affidavit are certain exhibits setting forth such facts in relation thereto as affiant has been able to ascertain from the books and records in her possession; that immediately after the death of her father, affiant caused a complete and careful inventory of the merchandise on hand to be made, and the same to be appraised, and said inventory and appraisement, with original signature of appraiser thereto, is hereto attached and made a part of this affidavit; affiant further says that the fixtures and equipment referred to and set forth in said appraisement were old, out of date, having been used by her father in his said business for upwards of twenty-five years, and on the liquidation of said business, affiant and her mother, as executrices of said estate, sold said fixtures and equipment for $368.00, that being the best price that could be obtained; with reference to the household goods listed, affiant says that the same had been used in her father's family for upwards of thirty years, and have little, if any value; that said household goods are at the family home at 2228 Larimore Avenue, Omaha, Nebraska, at this time, where they may be seen; that included in the schedule as items of assets, "storage" $1,769.00 and "jobs" $10,000, and in explanation thereof, affiant says that in the course of his business her father stored during the summer months, furs for customers; that ordinarily fur garments so placed in storage would be taken out by the owners about the first of October, or shortly thereafter; that when said garments were placed in storage, no charge or entry was made upon the books covering the amount of storage, but that when garments so stored were taken out by the owners, the storage charges were either collected in cash and entered upon the books, or a credit charge for the amount of the storage was entered upon the books against the owner of the garment; that during the months of October, November and December, 1921, the total monies so collected or charged by affiant for and on account of storage of fur garments, as aforesaid, amounted to the sum of $1,769.00, and affiant has entered on the schedule said amount as an item of property belonging to the estate of the deceased as of the date of his death; with reference to "jobs," affiant states that the same includes and repre-
[fol. 126] sents the charges made in the business for repairing, altering, or remodeling furs and fur garments, for the owners thereof; that at the time said work was brought in, no charges or entry was made upon the books; that such entry or charge was made only when the work was completed and the garment was taken out by the owner; that during the months of October, November, and December, affiant and her mother, as executrices of the estate, collected and charged on the books for "jobs" $13,959.37; that during said months, in carrying on and liquidating said business, affiant and her mother as executrices of said estate in charge of said business, did and performed certain "jobs" or altering, repairing and

remodeling furs and fur garments for the owners thereof, which "jobs" were taken out and paid for by the owners during said months; that of the sum so collected during the months of October, November, December, 1921, $10,373.45 represents the amount due on "jobs" done and completed by the decedent Gustave E. Shukert during his lifetime, and affiant has included said sum as an item of property or assets belonging to the estate of the deceased at the time of his death.

And further affiant sayeth not.

Isabel C. Shukert.

Subscribed in my presence and sworn to before me this 26th day of June, 1922. Robert A. Nelson, Notary Public. (Notarial Seal.) C 23

(Here follows reproduction of side folio pages 127 and 128)

[fol. 129] Furniture, Tools, etc.

Store.			Factory.		
2 Desks	10.00	$20.00	1 Shaker Machine		
4 Tables	10.00	40.00	1 Beating "		
4 Show Cases	12.00	48.00	2 Sewing "		
4 " "	25.00	100.00	4 Fur " " (Osann)	...	$175.00
4 Rugs	2.50	10.00	1 Staying Machine		
3 Mirrors	5.00	15.00	1 Quilting "		
2 Show Tables	5.00	10.00	2 Motors		
1 Typewriter	....	15.00			
1 Adding Machine	....	25.00			283.00
		283.00			458.00

I have examined the above stock and have appraised it as shown above, total appraisal $8,469.90.

(Signed) D. Loonis, Gen. Mgr. National Fur. & Tanning Co. C25

Memorandum re Gustave E. Shukert Estate

When G. E. Shukert sold the Railway Exchange Building in February, 1921 and secured a lease for only one year on his fur store and fur manufacturing rooms in the Railway Exchange Building, he immediately laid his plan for closing out his fur business at the termination of his lease. During the first half of each year, approximately, it was his custom to make purchases in anticipation of the fall business. The following figures showing his merchandise purchases during the first seven months of the years 1919, 1920 and 1921 show that in 1921 his purchases of merchandise were made with the idea of closing out his stock by February 1, 1922:

Skins

12	Electric Seal	2.00	24.00	6	Natural Ringtail	.50	3.00
246	Amer. Mink	2.75	676.50	33	" Coyote	1.00	33.00
3	Brown Fox	3.00	9.00	4	Black Pony	1.00	4.00
1	Cross "		10.00	7	Leopard "	.25	1.75
1	Taupe "		1.00	2	Nat. Wild Cat	.50	1.00
4	Marmots	.10	.40	3	Ocelot	.50	1.50
2	Per. Lamb	5.00	10.00	22	Otter	10.00	220.00
2	Unpl. Otter	25.00	50.00	95	Beaver	6.75	641.25
13	Dyed Ringtail	.50	6.50	71	Raccoon	1.00	71.00
5	Red Fox	7.50	37.50	73	Grey Fox	.25	18.25
14	Black Cat Lynx	1.00	14.00	27	Swift	.10	2.70
28	German Fitch	2.50	70.00	321	Dyed Opossum	.50	160.50
2	Wolverine	No Value		37	Badger	.25	19.25
33	Grey Squirrel	1.00	33.00	4	Blk Cat Plates	5.00	20.00
300	Skunk	1.25	375.00	2	T. Squirrel Belly Plates	2.50	5.00
122	Nat. Opossum	.25	30.50	8	Brown Weasel	.10	.80
7	Seal	30.00	210.00				
198	Civets	.25	49.50				1193.00
			1666.90				

Manufactured Articles

5	H. Seal Skunk Tr. Coats	150.00	$750.00
1	" " Blk. Op. "		100.00
4	" " Squi. tr. "	150.00	600.00
2	" " Beaver " "	135.00	270.00
1	Otter "		175.00
1	Beaver "		100.00
1	Mole "		150.00
1	N. Seal "		60.00
1	Sealine "		40.00
1	Hair Seal "		20.00
3	Hud. " plain "	125.00	375.00
1	" " Fitch tr. "		150.00
1	" " Lynx " "		125.00
1	Black Muskrat "		100.00
1	Marmot Raccoon tr. "		25.00
			3040.00

2	Am. Mink Scarfs	30.00	$60.00	1	Jap Mink Throw		25.00
5	Black Lynx "	25.00	125.00	5	Am. " "	60.00	300.00
1	" Dog "		2.00	3	Jap " Capes	45.00	135.00
1	" Fox "		10.00	4	Am. " "	100.00	400.00
5	Grey " "	2.50	12.50	2	Ermine Chokers	8.00	16.00
1	Coyote "		.50	2	Sq. Belly "	2.00	4.00
4	Raccoon "	5.00	20.00	2	Ermine Muffs	10.00	20.00
3	Red Fox "	10.00	30.00	2	Summer Ermine Muff	3.00	6.00
1	Civet Cat throw		10.00	3	Sable chokers	20.00	60.00
2	Sq. Belly capes	5.00	10.00	4	Fitch "	4.25	17.00
3	H. Seal Scarfs	20.00	60.00	1	S. Marten Choker		10.00
1	Skunk throw		22.50	6	Mink "	5.00	30.00
1	" scarf		2.00	2	Kolinsky "	5.00	10.00
1	Mole Cape		35.00	2	T. Squirrel "	3.00	6.00
1	" throw		50.00	1	G. " "		5.00
1	" choker		55.00	2	Civet "	2.00	4.00
6	T. Wolf scarfs	2.75	16.50	1	Squirrel "		6.00
1	Bro. " "		3.00	7	Blk,. Lynx Muffs	8.00	56.00
1	Beaver throw		20.00	4	" Coney "	1.00	4.00
1	" scarf		45.00	5	" Fox "	1.00	5.00
2	Grey Squirrel Scarfs	60.00	120.00	5	H. Seal "	7.50	37.50
1	Bro. Fox choker		10.00	2	Blk Dog "	1.50	3.00
1	Muskrat cape Skunk tr		8.00	1	Civet "		1.50
1	Skunk muff		10.00	1	Pointed Dog "		1.50
6	Red Fox "	3.00	18.00	2	Grey Fox "	.50	1.00
2	W. Cat "	1.50	3.00	1	Ped Wht Skunk "		.50
1	T. Wolf "		3.50	3	Beaver "	10.00	30.00
1	Bro. Fox "		4.50	1	Blended MRat "		1.00
1	Ringtail "		5.00	1	Ped Am. Mink "		1.00
1	Jap Mink "		10.00	4	Am. Mink "	15.00	60.00
12	Blk Square Muffs	1.00	12.00	3	Coyote "	1.00	3.00
			713.00				1259.00
24	Pieces of Silk & Fur Supplies (chains, eyes, buttons, snaps, etc.)						200.00

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Year, Jan. to July.	Mdse. bot. for manufacture.	Mdse. bot. for retail.		Total.
1919 (Jan. & Feb.)	.....	.....	21,905.56	
1919 (Mar.-Jul.)	19,085.38	6,029.96	25,715.34	
				47,620.90
1920	45,867.58	15,604.46	.....	61,472.04
1921	20,946.60	1,926.96	.....	22,873.56
Jan. 1, 1919:				
Merchandise stock on hand			47,986.60	
Merchandise Bought January to July			47,620.90	
				95,607.50
Jan. 1, 1920:				
Merchandise stock on hand			14,491.39	
Merchandise Bought January to July			61,472.04	
				75,963.43
Jan. 1, 1921:				
Merchandise stock on hand			16,115.70	
Merchandise Bought January to July			22,873.56	
				38,989.26

The above figures do not include any manufacturing costs in connection with merchandise bought. The total shown for the first seven months of 1921 indicates clearly the plan of Mr. Shukert to close out his fur stock at the end of the season.

C26

[fol. 130] Memorandum Gustave E. Shukert Estate

Summary of the Operations of the Fur Business Conducted at 401 South 15th Street, Omaha, Nebraska, During the Years 1915 to 1920 Inclusive.

The figures given for the year 1919 are made up from report of G. E. Shukert for the months of January and February and the report of the Shukert Fur Company, operating as a partnership for the months of March to December inclusive. The figures for the year 1920 are made up from the partnership report for the months of January and February and the report of G. E. Shukert for the months of March to December inclusive. These reports have been combined in order to show the complete operations of the fur business during the period.

Year.	Gross income.	Expenses and cost goods sold.	Net earnings.	Factory labor, mdse. bought, and stock adjmt.
1915	71,869.15	68,421.32	3,447.83	54,219.66
1916	84,562.66	78,527.01	6,035.65	57,550.06
1917	92,904.26	85,785.72	7,118.54	80,426.68
1918	90,364.92	88,072.04	7,059.41	81,207.68
1919	175,076.49	141,247.29	33,829.20	126,179.53
1920	127,999.67	114,894.66	13,105.01	104,415.61

Practically all of the earnings shown for the year 1919 were made by the partnership, consisting of five members which began on March 1st of that year and terminated on March 1st, 1920.

1915-1918 inclusive, $20.00 per week on salary handled as factory laborer allowed Gustave E. Shukert.

March, 1919, to September 29, 1921, no salary to Gustave E. Shukert was charged to expense of operation of business.

No charge for rent of quarters occupied by fur business was charged to expense of operation of business during years 1920 and 1921.

G. E. Shukert Balance Sheet, December 31st, 1917

There is no record of any balance sheet having been prepared for this year and the statement of assests shown in the Income Tax Report for that year cannot be checked with any records.

1916

No balance sheet was prepared for this year and there are no books available from which such a statement can be prepared.

C28

Ledger Statements, December 31, 1918

Fur Stock	47,989.60	
First National Bank	2,636.92	
Cash in office	438.67	
Liberty Bonds	30,199.15	
Accounts Receivable	21,930.27	
Accounts payable (Petty Bills)		745.72
Mortgages (Net reduction 1918)		1,456.37
G. E. Shukert		100,992.52
	103,194.61	103,194.61

C29

[fol. 131] G. E. Shukert Balance Sheet, December 31, 1919

Assets:

Cash on hand and in bank	12,185.70
Book Accounts Receivable	27,287.78
Equipment	2,323.50
Certificate of Deposit	25,000.00
Notes Receivable	24,780.00
Fur Stock	14,491.39
Personal Accounts (Partners)	7,729.44

Liabilities:

G. E. Shukert (Fur Business) 3/1/19	68,679.33
Cash Over	525.09
Unearned Interest	624.45
Excise Tax Accrued	1,103.50
State and County Tax—due 11/1/19	1,214.31
Profits	41,651.03
	113,797.81 113,797.81

This balance sheet was taken from general ledger in use in fur store through which all collections were handled, not only of fur business but also interest from all sources and rental returns. The state of assets does not include all of the investments of G. E. Shukert.

C30

G. E. Shukert Balance Sheet, December 31st, 1920

Assets:

Accounts Receivable Fur Business		16,468.77
" " Special		14,208.74
Cash in Store	299.41	
Cash in Bank	874.66	
		1,174.07
Equipment		2,440.66
Fur Stock Inventory 12/31/20		16,115.70
Notes & Mortgages		88,090.23

Liabilities:

Shukert Fur Company	48,180.36
Cash Over	719.84
Excise Tax	461.45
Unearned Interest	769.34
Depreciation Reserves	5,270.00
Surplus	83,097.18
	138,498.17 138,498.17

This balance sheet was taken from general ledger in use in fur store through which all collections were handled, not only of the fur [fol. 132] business but also interest from all sources and rental returns. The statement of assets does not include all of the investments of G. E. Shukert.

C31

Balance Sheet

Taken from Ledger in Use in Fur Store of G. E. Shukert, Sept. 30th, 1921

Assets:

Accts. Rec.—Wholesale	3,535.84		
" " retail	384.85		
		3,920.69	
First National Bank	1,765.47		
Cash in Store	668.93		
		2,434.40	
Equipment—Shop and Store		2,210.59	
Merchandise Stock 9/30/21		8,011.90	
Notes and Mortgages	103,833.96		
Bonds (St. Ry. & Porto Rican)	24,000.00		
		127,833.96	

Liabilities:

Depreciation—16th St. Bldg.		2,625.00
Interest Unearned		596.68
Accounts Payable		3,012.43
Excise Tax Payable		407.35
Shukert Fur Company		45,348.20
Surplus		83,764.50
Accts. pay.—Income tax		8,657.38
	144,411.54	144,411.54

C32

Estate of Gustave E. Shukert, District of Nebraska

SCHEDULE E—Transfers

Instructions

All gifts and transfers, including trusts, of a material part of the estate, made or executed by the decedent within two years prior to the date of death, other than by a bona fide sale, for a fair consideration in money or money's worth, must be returned under this schedule and the value of the property shown in the first column. The value must also be extended into the second column for inclusion in the gross estate unless the executor has clear evidence to show that the transfers in question were not in fact made in contemplation of death.

All gifts and transfers made in contemplation of death or to take effect at or after death without such consideration, are taxable and must be included in the gross estate regardless of the date of transfer. All transfers of a material part of the decedent's estate made more than two years prior to death must be returned under this schedule, but the value need not be extended into the second column if the executor desires to contend that the transfers were not made in contemplation of death.

[fol. 133] In all cases where a transfer or gift is listed under this schedule, but the value not extended into the second column for inclusion in the gross estate, the executor is required to submit as a part of the return documentary evidence in the form of affidavits fully setting forth all the facts and circumstances indicating the intent of the decedent in making the transfer.

Where the transfer was effected by deed of trust, copy of such instrument should be filed in duplicate.

Make full entry, giving name of transferee, date and form of transfer, description of property, and value at time of death.

For further instructions see Article 22 et seq., Regulations No. 37, Revised, 1919.

(1) Did the decedent, during the period within two years prior to death, make any transfer of a material portion of his estate in the nature of a final disposition or distribution thereof without a fair consideration in money or money's worth? (Answer "Yes" or "No.") No.

(2) Did the decedent, at any time prior to two years before his death, make any transfer or create any trust in contemplation of or intended to take effect at or after death without consideration? (Answer "Yes" or "No".) No.

(3) Did the decedent, at any time, make a transfer of a material portion of his estate without consideration, but not believed to be in contemplation of death or intended to take effect at or after death? (Answer "Yes" or "No.") Yes.

(4) What trusts, if any, created by the decedent, were in existence at the time of his death? Trust of date May 5, 1921. United States Trust Co., Omaha, Nebr. Trustee.

Item No.	Details of transfer	Value on day of death	Value to be included in gross estate
1	See copy of Trust Agreement and affidavits hereto attached for detail of Trust	$225,000.00	$.....
	Total	$225,000.00	$None.
	Grand Total		$None.

(If more space is needed, insert additional sheets of same size.)

E 6 C 33

STATE OF NEBRASKA,
Douglas County, ss:

H. T. Cutler, being duly sworn, says: I am vice-president of the United States Trust Company of Omaha, Nebraska, the trustee named in that certain Trust Agreement of date May 5, 1921, made and entered into by Gustave E. Shukert, deceased; I had several con-

versations with Mr. Shukert concerning the creation of said Trust [fol. 134] fund prior to the execution of said Trust Agreement, and it is my belief that at the time said Trust Agreement was given to the United States Trust Company, said Shukert was in good health and fully expected to live many years; my reasons for this opinion are as follows: Mr. Shukert was possessed of a large estate over and above what he contemplated putting in the Trust fund agreement, he told me that he had always been quite successful in his investments, and he believed that, with his experience and capital, he always would have sufficient for himself during his life, and for his wife and children after his death, but that in case of reverses in business coming to him in after years it was his desire that his children should not suffer in their old age; therefore, he wished to put a certain amount of money in Trust to be paid to them in their old age, and that later on, if he continued to be successful in his investments, he would probably create another Trust Fund from which his children could receive the income at regular stated intervals; the Trust Agreement made with United States Trust Company was the amount of the proceeds of the sale of the Railway Exchange Building property at 15th & Harney Streets, Omaha, Nebraska, the mortgage which was taken back on the property maturing thirty years from date of sale, and this mortgage, together with liberty bonds, covering the first payment, constitute the Trust Fund; I remember asking said Shukert why he did not give the children the benefit of the income during the life of the trust, and he told me he was good for fifteen or twenty years, in his opinion, and during that time he would take care of his children or later make other arrangements so that they would not suffer because of the tieing up of these funds; he also remarked that in the next five or ten years he would be able to get a better line on the children's business ability and at that time would make other arrangements which would cover things more completely; I recall that during my conversation with said Shukert I mentioned that a Trust was a wonderful thing, as a man in that way could make provision during his life for the future of himself or those named as beneficiaries of the Trust, and said Shukert very pointedly told me that in creating said Trust and making said Trust Fund Agreement, he did not do so because he had any thought of death, but because he did not need the funds placed in the Trust, and that he created said Trust for the children, believing that it would act, more or less, as an incentive to them to save, as they would be able to see from time to time how interest accumulated, and that they would know that he was willing and ready to do all [fol. 135] that he could for all or any of them at any time; and further affiant sayeth not.

H. T. Cutler.

Subscribed in my presence and sworn to before me this 27 day of June, 1922. H. A. Christensen, Notary Public. (Notarial Seal.)

STATE OF NEBRASKA,
County of Douglas, ss:

John H. Caldwell, being duly sworn, says: I am Vice-president and Trust Officer of United States Trust Company of Omaha, Nebraska, the same being the Trustee named in that certain Trust Agreement executed by the late Gustave E. Shukert on May 5, 1921; that prior to the execution of said Trust Agreement, I had several conversations with the said Gustave E. Shukert in connection with the forming of a Trust Fund by him with United States Trust Company; that in discussing the purpose and benefits of such fund he stated that he was retaining a very substantial estate aside from the sum to be placed in trust, and that the latter sum would constitute a fund which would compound itself during the term of the Trust; that he expected to live for many years and could readily spare the funds so placed in trust, which would be in the meantime self-increasing so that when, if future need arrived, it would be available for such purposes for the benefit of those named in the Trust; that at the times of the said conversations, he was apparently in good health, and at no time did he indicate to me by word or action that he had any thought or expectation other than that of a long life before him; and further affiant sayeth not.

John H. Caldwell.

Subscribed in my presence and sworn to before me this 13th day of June, 1922. Sarah A. Lemley, Notary Public. (Notarial Seal.)

C41

[fol. 136] STATE OF NEBRASKA,
County of Douglas, ss:

E. Holovtchiner being duly sworn says: I am by profession a physician and surgeon, and have practiced as such in the City of Omaha for upwards of 25 years; I have maintained my offices in the Railway Exchange Building for more than fifteen years last past, and was acquainted with the deceased Gustave E. Shukert during his life time; I attended the deceased at the time of his death; I was called to treat him in relation to the sickness which caused his death, in July, 1921; I had treated him prior to that time for bronchial trouble, but on July 5, 1921, I was called to see him when he had his first attack of his troubles, and I ordered him to bed; I attended him from that date until his death; his death was caused by a complication of diseases; he had asthma and bronchitis and anemia; the asthma and bronchitis finally attacked his heart, and he had arterior-sclerosis, enlargement of the heart, some stomach trouble and liver trouble; I do not think that his bronchial trouble had anything to do with his death; he had old chronic asthma—what you call "fur asthma," had had it for years; he did not remain in bed continuously from the time I ordered him to bed in July until his death in the following September; he stayed home three weeks, and then came back to his business, and after a while he took sick again and I sent him to the hospital about the middle of September; he was in the hospital about two weeks, and died

September 29, 1921; I knew Mr. Shukert for many years prior to his death, was intimately acquainted with him; on various occasions I urged him to quit business and retire, to have a good time and enjoy the money he had accumulated; on one occasion, after the sale of the Railway Exchange Building property, he told me he was going to liquidate and close out his fur business by February 1, 1922, because at that time his lease was up, and then he was going on a traveling tour, that he probably would go out to California and stay there for sometime, and then come back to Omaha where he was going to open a little office where he could transact his private business, have his friends call upon him, have a little library, and have a good time with his friends; that after he had closed out his fur business, he was going to give up business entirely, and have a good time; he told me this before he took sick, and he also told me the same thing while at the hospital before his death; Shukert never at any time expressed a thought to me that his fur asthma would hasten his death; I frequently told him to take care of [fol. 137] himself because he had asthma, and that complications might follow, but he was always against this idea, and said: "I have lived forty years with this asthma, and I am going to live to be an older man than you"; Shukert was a man who had unlimited faith in himself, and relied in all things entirely on his own judgment; he was apparently a strong man both mentally and physically; so far as I know, he never thought about death or sickness; he was always thinking of business, he had made money, and was always thinking of making more, and looking to that end; he never mentioned to me that any of his ancestors had died suddenly; the impression I got from my conversations with him was that he felt that he had accumulated sufficient of this world's goods to enable him to take life easy, and have a good time; he never mentioned to me anything about placing the proceeds of the sale of the Railway Exchange Building property in trust; I never heard anything of that; in his talks with me, he was always talking about making money, and telling me how I could invest my money like he did; his death was rather sudden, his troubles attacked his heart; when he returned to his business after I had ordered him to bed in July, 1921, I told him that he should go to bed and stay there for weeks and rest and regain his health and strength, but he said: "I can get well and will get well and go back to the business and my store," and he did, after staying in bed three weeks, and was attending to his business; I cautioned him again, and told him he ought not to attend to business, and should go back to bed and rest; he laughed at me, saying: "I will get over it, I will recuperate and get stronger than you are now"; as stated above, his death was sudden; I do not believe he had any premonition or thought of death; and further affiant sayeth not.

Dr. E. Holovtchiner.

Subscribed in my presence and sworn to before me this 27 day of June, 1922. Robert A. Nelson, Notary Public. (Notarial Seal.)

STATE OF NEBRASKA,
County of Douglas, ss:

R. W. Harbor being duly sworn says: I am the Secretary and Treasurer of the Shedd Investment Company, a corporation dealing in farm lands and mortgages; that I have maintained an office [fol. 138] in my present location on the fifth floor of the Railway Exchange Building since the autumn of 1909, having held a lease with Gustave E. Shukert, the deceased, continuously since that time until his death in the fall of 1921; that for ten years prior to the death of Gustave E. Shukert, I handled a large number of investments for him, and during the five years prior to the death of said Gustave E. Shukert, I was in very close personal touch with all of his financial transactions; that during this period it was Mr. Shukert's practice to come to me for conference on all of his financial matters, with the exception of those which referred to the conduct of his fur business; that in recent years, Mr. Shukert's investment busniess had grown to such proportions that he frequently told me he was desirous of disposing of all his real estate and fur business, and devoting his time to his investment business; that in the spring of 1920, Mr. Shukert entered into an option agreement with J. H. Dumont, J. D. Wear, and L. J. Piatti covering the sale of the Railway Exchange building property; and during the pendency of this option agreement, Mr. Shukert on several occasions stated to me that when the sale of the building was closed, he intended to place the proceeds of said sale in Trust for the ultimate benefit of his children, and that it was his plan to liquidate his fur business as soon as possible after he had disposed of the Railway Exchange Building property, because the fur business was no longer a pleasure to him, owing to the problems involved in getting satisfactory help in his manufacturing department; that he had accumulated sufficient wealth to enable him to carry on an investment business which would not involve any controversy with laborers; that at the time said Shukert entered into the option agreement for the proposed sale of the Railway Exchange Building property and in fact on various occasions prior thereto, said Shukert had suggested that a Trust company be formed and started by himself, affiant, and affiant's associates, and that he, Shukert, would invest sufficient capital in the institution to make it a factor in the city, the working out of this plan to be discussed by the said Shukert and the affiant in detail as soon as he, Shukert, had liquidated his fur business; that on or about February 1, 1921, said Shukert closed the sale of the Railway Exchange Building property through George & Company, as agents, and he then discussed with the affiant the matter of placing the proceeds of the property in a Trust, and requested this affiant get information from a Trust Company in regard to carrying out said plan, which he, Shukert, as stated, contemplated turning over to a Trust Company all the proceeds of the Railway [fol. 139] Exchange Building property in Trust for his wife and children, and that this Trust was to continue until the maturity of the date of the mortgage which he was carrying back on the Railway Exchange Building property; that on February 7, 1921, this

affiant met H. T. Cutler, vice-president of the United States Trust Company of Omaha, and outlined to him the plan Mr. Shukert had in mind; shortly thereafter, the said United States Trust Company prepared a draft of a trust agreement, and said Shukert and affiant discussed it generally; that affiant pointed out to said Shukert that according to the terms of the trust agreement, he, Shukert, would part with $225,000 of his property and would never have anything to say about it in the future; that said Shukert stated to affiant that this was just what he had in mind, that he had sufficient assets left to properly take care of himself and his family, and that he would in the future, as in the past, continue to make money; that at said time when said Shukert and affiant were examining the proposed trust agreement, said Shukert made this remark: "You see now Harbor, if we had our trust company going, we could have this business," and then added that there would be enough left, and that the placing of said sum of $225,000 in trust at that time would make no great difference with the plan of Shukert, affiant and affiant's associates to organize a trust company; the trust agreement with the United States Trust Company was finally closed on May 5, 1921; that during the many discussions affiant had with said Shukert on many financial matters, including the said trust agreement, said Shukert never indicated in any way a thought of ill health or of possible death in the near future; in fact, all his discussions pointed to a long expectancy of life on his part; on July 23, 1921, as shown by a memo in affiant's office, said Shukert stated that he was cleaning up his business and that he would soon be ready to take up the matter of the new business plan which said Shukert and affiant, and affiant's associates had tentatively discussed for sometime past; that on August 16, 1921, affiant returned to Omaha after a week's absence, during which time he had made an inspection of property on which said Shukert held a mortgage, and on that day called at the Shukert home to report; that he found said Shukert ill at that time, but apparently was recovering, and discussing business as keenly as ever; that said Shukert stated that he would be in affiant's office in a few days to go over various matters; that during the week following and until about the middle of September, 1921, said Shukert called almost daily at Affiant's office, and discussed investment matters; that on September 7, 1921, [fol. 140] affiant mentioned to said Shukert certain matters which required his attention, and said Shukert replied that there need be no hurry and added that as soon as he had disposed of his fur business, he wanted to talk with affiant and his associates the details of the plan for the organization of a trust company; that about a week afterward, said Shukert was sent to the hospital and on September 16, 1921, affiant called on said Shukert at the hospital and said Shukert immediately inquired regarding a large loan which affiant was then negotiating for him; at this time Shukert's mind was as keen and active as ever, and he stated that if it appeared that said loan could not be made on the terms that had been outlined, that affiant should submit something else to him for his approval; that affiant again called on said Shukert at the hospital on Thursday, September 22, 1921, and said Shukert again discussed business

matters in a manner indicating absolute certainty of recovery, and at no time on or prior to said date did said Shukert ever by word or act indicate to affiant that he had any thought other than that of a long life before him; affiant saw said Shukert at the hospital on Sepember 24, 1921, and at said time said Shukert give his first intimation of concern as to his condition, said Shukert saying to affiant at that time: "I guess I am down and out"; and further affiant sayeth not.

R. W. Harbor.

Subscribed in my presence and sworn to before me this 15 day of June, 1922. & Robert A. Nelson, Notary Public. (Notarial Seal.)

C44

STATE OF NEBRASKA,
County of Douglas, ss:

William H. Herdman, being first duly sworn, says; that he is an attorney-at-law, and has practiced as such in Omaha, Douglas County, Nebraska, since 1890; that the decedent Gustave E. Shukert was 56 years of age in March, 1921, and died at Omaha, Nebraska, on September 29, 1921; that affiant was attorney for said Gustave E. Shukert for more than ten years prior to his death, and as such attorney became familiar with the affairs, business, plans, and purposes of said Shukert; that on May 5, 1921, said Gustave E. Shukert executed the Trust Agreement wherein United States Trust Company of Omaha, Nebraska, is named as Trustee; at the time of [fol. 141] executing said Trust Agreement, the said Gustave E. Shukert, under the Carlisle and American tables of life expectancy, had a life expectancy of between sixteen and seventeen years, and his family consisted of his wife, Elizabeth F. Shukert, two daughters, Isabel C. Shukert, and Flora Shukert, each of whom were upwards of twenty-one years of age, and a son, Gustave E. Shukert, Jr., a minor, then about sixteen years of age; the said Trust so created covered a fund of $225,000.00, which was something less than 25% of the total property and estate of said Gustave E. Shukert, deceased; at various times during the two or three years preceding the execution of said Trust Agreement, the said Gustave E. Shukert talked with me about creating a Trust covering a part of his property; these talks prior to the spring of 1920 were general in their nature; in the spring of 1920, said Shukert had on negotiations with George and Company of Omaha, Nebraska, and also with Messrs. Dumont, Piatti, and Wear for the sale of certain property owned by him located at the Southeast corner of 15th & Harney Streets, Omaha, Nebraska, and known as The Railway Exchange Building property, both of said negotiations, however, fell through; at and during the times these negotiations were pending, said Gustave E. Shukert told me that it was his intention, if either of said sales went through, to liquidate and colse out his fur business, and to put the proceeds of said sale of said real estate in a Trust, and to devote the remainder of his life looking after his investments, for that purpose rent an office in some office building in the city, and

to spend considerable time in travel; late in the year 1920 or early in the year 1921, he again entered into negotiations for the sale of said Railway Exchange Building property, said negotiations, being had through and with George and Company of Omaha, Nebraska, and *as agents for Sunderland Brothers* of said city; I was and am, familiar with said negotiations, and had many conferences with deceased in relation thereto; at that time and during the pendency of said negotiations, the said Gustave E. Shukert again told me if the sale was made he intended to close out his fur business and liquidate the same, and place the proceeds of the sale of the Railway Exchange Building property in a Trust and devote his time thereafter to his investments and travel; that on closing out his fur business he would rent an office where he could look after his other business, and receive his friends; the negotiations last referred to resulted in the sale of said Railway Exchange Building property to Sunderland Brothers, the title, however, to the property being taken by Sunderland Brothers in the name of Eleanor Peterson, the [fol. 142] consideration for said sale being $225,000.00, $35,000.00 of which was paid in cash, and special warrants of the City of Omaha, and the remainder, $190,000, evidenced by promissory notes secured by first mortgage upon said property, said sale being completed on February 1, 1921, and said notes and mortgage securing same dated February 1, 1921; of said notes, ten were for the sum of $5,000 each, the first becoming due February 1, 1922, and one of said series becoming due annually thereafter, and one of said notes was for the sum of $140,000 falling due February 1, 1951; in the sale of said Railway Exchange Building property, the deceased Gustave E. Shukert reserved the right to continue to occupy that part of said premises which he had therefore occupied with his fur business until February 1, 1922, paying rent therefor; at the time he closed up said deal, said Gustave E. Shukert again advised me that he intended to retire from his fur business by February 1, 1922, to place the consideration received by him for the sale of said Railway Exchange Building property, or its equivalent, in Trust for a period expiring with the due date of the $140,000 note, to-wit, February 1, 1951, and that he would devote his time after liquidating his said fur business to looking after his other investments and to travel; I had no part in the preparation of the original draft of said Trust Agreement; my understanding is that the rough or original draft of said agreement was prepared by United States Trust Company, the Trustee named in the Trust Agreement, but such rough draft was submitted to me for opinion and approval; I made some changes in the phraseology, and perhaps added certain provisions thereto, which I do not remember at this time; at the time said proposed agreement was before me, the deceased, Gustave E. Shukert conferred with me about said agreement, and again stated to me that he intended to liquidate and close out his fur business by February 1, 1922, and not to re-engage in said business or any business thereafter, except as he might after his son became of age, start his son in business and give to his son the benefit of his knowledge and experience in such matters; he again on

said occasion repeated to me his determination to rent an office and look after his other property and investments, and to spend more or less of his time in travel; in this connection, I would say that when the Trust Agreement was before me, in discussing some of the provisions thereof, particularly those relating to the term of said Trust and the time when the beneficiaries would receive the benefit of the Trust, I mentioned that it might be possible that before the expiration of the terms of the Trust some of his children might be [fol. 143] so situated as to need money or capital; he replied he had enough outside of what he put into the Trust to provide for himself and his family to comfortably settle and start his children in life; during the said conversations, I suggested to him that it was possible that his son after starting in business might be unfortunate and become financially involved; to this the deceased laughed, and said he expected to live a great many years, certainly long enough to teach his son the ways of the business world, and to guide his sone until such time as his son was able to take care of himself in such matters; in explanation of his intentions to liquidate and close out his fur business in the sale of the said Railway Exchange Building property, the deceased told me on several occasions that he had worked hard all his life; that he had now accumulated a competence, and that conditions within the fur business, such as the labor situation, were such that it was no longer any satisfaction to have a business if a man could find anything else to do; during the time of all the conversations and transactions hereinbefore referred to, the deceased, so far as I know, was in good health and at no time prior to the time of his last illness in September 1921, did he ever say to me that he was a sick man; on the contrary, during all of said times he appeared to me to be a man in good health, active and energetic in the management of his affairs; and constantly planning for the future; the deceased was under a doctor's care, for the first time to my knowledge, in July preceding his death; I was informed that the doctor had ordered him to remain at home and rest; he came to my office a few days after the doctor had so directed him to remain home, and in response to my inquiry as to why he had disobeyed the doctor he laughed and said he was alright and would outlive many of those who thought he should remain at home and rest; the deceased became ill about two weeks before his death, and was taken to the Nicholas Senn hospital in the City of Omaha, where he died on September 29, 1921; I saw him at said hospital on three occasions before his death: I cannot at this time recall how long my first visit to him at the hospital was before his death, but it was several days: at that time he talked to me about various business matters connected with his business and investments, and said that just as soon as he got out of the hospital he would call at the office and take them up with me further; at the time of said visit and talk, neither by word or action did he indicate to me that he thought he was seriously ill, on the contrary, his mind was as active as ever on his business affairs, and, as stated, his conversation was with ref- [fol. 144] erence to same, and he stated as soon as he got out of the

hospital, he would call at the office and we would consider such affairs further; my second visit to the hospital was some days later, when I was called to the hospital to prepare his will, and my third visit was the day following when I called at the hospital to have the will duly signed and executed; my second visit was on September 26 and my third visit was on September 27; I further state that at no time during the period while I was attorney for said deceased did there come to my knowledge any trouble of a personal nature involving him in any way, so as to cause him any distress of mind or worry or anxiety; on the contrary, so far as my knowledge, extends, his life was singularly free from anything of that nature; In November, 1920, a Mr. Musgrave, one of the tenants of said Railway Exchange Building was seriously hurt and injured in the elevator in said building; Musgrave was not only a tenant of the deceased, but also a close friend and acquaintance, and the accident caused the deceased to feel that distress that one friend feels when another is injured on his premises; the deceased carried insurance against the liability, and after suit was brought by Musgrave, I settled the case without trial; at no time did the deceased ever suggest to me that he was uncertain or in doubt as to the state of his health, or apprehensive of an early death, but on the contrary, laughed at suggestions that he should take a rest and was constantly planning for the future; and further affiant sayeth not.

William H. Herdman.

Subscribed in my presence and sworn to before me this 27 day of June, 1922. Robert A. Nelson, Notary Public. (Notarial Seal.)

C47

Estate of Gustave E. Shukert, District of Nebraska

SCHEDULE F—Powers of Appointment

Instructions

Property passing under a general power of appointment exercised in the decedent's will must be returned. If the decedent exercised a general power by deed, the property must be included in the gross estate if the deed was made in contemplation of death or intended to take effect at or after death, except where executed for a fair consideration in money or money's worth.

[fol. 145] Certified copy, in duplicate, of the will or deed conferring the power upon the decedent, and of the instrument by which the power was exercised, must be filed with the return.

Property passing under the exercise of a power of appointment should not be listed under any other schedule.

For further instructions see Article 30 et seq., Regulations No. 37, Revised, 1919.

(1) Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general power of appointment? (Answer "Yes" or "No.") No.

(2) Did the decedent, at any time, by will or otherwise, exercise a limited power of appointment? (Answer "Yes" or "No.") No.

Item No.	Description and details	Value on day of death	Accrued income
....	.....	$.....	$.....
	Total	$.....	$.....
	Grand Total		$.....

(If more space is needed, insert additional sheet of same size.)

F 7 C48

Estate of Gustave E. Shukert, District of Nebraska

SCHEDULE G—Property Identified as Taxed Within 5 Years

(Taxed under Act of October 3, 1917, or Revenue Act of 1918)

Instructions

Before executing this schedule read carefully Articles 50 et seq. and 62, under Regulations No. 37, Revised, 1919.

Property identified as received from an estate taxed within five years, or acquired in exchange for such property, must be included in this schedule and deduction taken under Schedule K. In order to be entitled to this exemption, the first decedent, must have died subsequent to October 3, 1917, and the second decedent must have died on or after February 25, 1919. The exemption is limited to the identical property received or property identified as acquired by first exchange of such property. No exemption is permitted for property acquired by a second or subsequent exchange.

If property identified as acquired by first exchange is listed, it must be listed in such manner as to indicate that fact and to show the original property received from the first estate.

If property is acquired by exchange, the full value of the property must be entered in this schedule and carried forward to the recapitulation of the gross estate, even though the present decedent gave additional valuable consideration over and above the value of the property given in the exchange. In such cases there should be deducted in the space provided below the proportion of the present value of the property received in exchange that the additional consideration bore to the entire consideration given. For example: An item of prop- [fol. 146] erty valued at $10,000 is exchanged for an item of property valued at $15,000, $5,000 additional being given by the decedent. The full value of the property received in exchange should be listed in this schedule, but one-third of the present value should be

deducted in the space below before the total is carried forward to Schedule K as a deduction.

Unless property can be clearly identified, the deduction cannot be taken. The burden of proof rests upon the person claiming the deduction.

If property of this nature has been received from more than one estate, give separate statements for each estate, repeating the heading given below:

Estate of Prior Decedent

Name of decedent: —— ——. Date of death: —— —, ——.
Resident at time of death: ——.
Name and address of administrator or executor: —— ——.
Return filed with collector at ——.

Item No.	Description of property	Value on day of death	Accrued income
....	None.	$.....	$.....
	Total to be included in the gross estate	$.....	$.....
	Less proportion of present value of property acquired by exchange representing proportion of additional consideration given (see above)	.....	.....
	Total to be taken as Deduction (see Schedule K)	$.....	$.....

(If more space is needed, insert additional sheets of same size.)

G 8 C49

Estate of Gustave E. Shukert, District of Nebraska

Deductions

SCHEDULE H—Funeral Expenses and Administration Expenses

Instructions

Funeral expenses and miscellaneous administration expenses should be itemized. Give name of creditor and exact nature of expense. Preserve all vouchers and receipts for inspection.

No deduction may be taken upon the basis of a vague or uncertain estimate, but a close estimate is deductible. Where the amount is estimated, indicate that fact.

Executors' or administrators' commissions may be estimated, provided that the commissions will be awarded by the court of probate jurisdiction or allowed in a probate account and will be paid.

Attorneys' fees should be entered in the exact amount paid or to be paid. In the absence of an award by the court, this item is not de-

ductible in these States where the fee is a charge against the executor and not against the estate.

Estate, legacy, succession, and inheritance taxes, and taxes on income accrued after death, are not deductible.

[fol. 147] For further instructions see Articles 37 et seq. and 59 et seq., Regulations No. 37, Revised, 1919.

	Amount of item	Totals
Funeral expenses:		
a. Hoffman Funeral Home—casket; services as undertaker, etc.	$1,822.60	
b. Forest Lawn Cemetery—burial lot, etc.	3,731.00	
Total Funeral Expenses	5,553.60	$5,553.60√
Executors' commission		5,500.00√
Attorney's fee		15,000.00√
Miscellaneous administration expenses:		
Robert Nelson, Guardian ad litem fee	100.00√	
Court costs, probate court	150.00√	
See certificates of Judge of County Court attached.		
Total Miscellaneous Expenses	$6,250.00	
Total		$26,303.60

(If more space is needed, insert additional sheets of same size.)

H. 9 C50

County Court, Douglas County, Omaha, Neb.

Bryce Crawford, Judge. Clyde C. Sundblad, Clerk

In the County Court of Douglas County, Nebraska

In the Matter of the Estate of Gustav E. Shukert, Deceased

State of Nebraska,
County of Douglas, ss:

I, Bryce Crawford, Judge of the County Court in and for said county do hereby certify that I have examined the records now on file in said court in the matter of the estate of Gustave E. Shukert, deceased and that said records show the following costs of administration allowed against said estate:

W. H. Herdman, attorney fees	$15,000.00
Executors' commission	5,500.00
Robert Nelson, guardian ad litem	100.00
Court costs County Court	150.00

[fol. 148] In witness whereof I have hereunto set my hand and official seal this 26th day of May, 1922.

Bryce Crawford, County Judge, by Clyde C. Sundblad, Clerk of the County Court.

C51

COUNTY COURT, DOUGLAS COUNTY, OMAHA, NEB.

Bryce Crawford, Judge. Clyde C. Sundblad, Clerk

In the County Court of Douglas County, Nebraska

In the Matter of the Estate of Gustav E. Shukert, Deceased

STATE OF NEBRASKA,
County of Douglas, ss:

I, Bryce Crawford, Judge of the County Court in and for said county do hereby certify that I have examined the records now on file in said court in the matter of the estate of Gustav E. Shukert, deceased and that said records show the following funeral expenses allowed against said estate:

Hoffman Funeral Home	$1,822.60
Forest Lawn—Burial lot	3,731.00

In witness Whereof, I have hereunto set my hand and official seal this 26th day of May, 1922.

Bryce Crawford, County Judge, by Clyde C. Sundblad, Clerk of the County Court.

C52

(Here follows Schedule I, marked side folio pages 149 and 150)

[fol. 151] County Court, Douglas County, Omaha, Neb.

Bryce Crawford, Judge. Clyde C. Sundblad, Clerk

In the County Court of Douglas County, Nebraska

In the Matter of the Estate of GUSTAV E. SHUKERT, Deceased

STATE OF NEBRASKA,
County of Douglas, ss:

I, Bryce Crawford, Judge of the County Court in and for said county do hereby certify that I have examined the records now on file in said court in the matter of the estate of Gustav E. Shukert,

SCHEDULE I.

Debts of Decedent.

Instructions.

Itemize fully below all valid debts of the decedent due and owing at the time of death. Preserve all vouchers for inspection.

If deduction is claimed for a debt, the amount of which is disputed or the subject of litigation, only such amount may be deducted as the estate concedes to be a valid claim. The fact of litigation should be stated. If any debt has been canceled by the creditor, no deduction may be taken.

Enter notes unsecured by mortgage under this heading and give full details, including name of payee, face and unpaid balance, date and term of note, interest rates and date to which interest was paid prior to death.

Care must be taken to state the exact nature of the claim as well as the name of the creditor. If the claim is for services rendered over a period of time, state the period covered by the claim. Example: January 1, 1919, Edison Electric Illuminating Company, for electric service during December, 1918, $25.

Item No.	Date of claim.	Creditor and nature of claim.	Amount.
1.		Burns-Brinker—Balance due on Porto Rico Bonds	$ 9,721.10
2.	Sep-26-1921	W. H. Herdman—Bal. due for Atty. fees	350.00
3.	Sep-28-1921	Dr. A. B. Dunn—Doctor fee	50.00
4.	" " "	Dr. E. Holovschiner—Doctor fee	890.00
5.	" " "	Dr. A. K. Detweiler " "	100.00
6.	" " "	Drs. Condon & Nuell " "	100.00
7.	" " "	Nicholas Senn Hospital—Hospital fee	100.00
8.	" " "	Drs. W. O. and E. L. Bridges—Doctor fee	25.00
9.	" " "	Hess & Swoboda—Flowers Funeral	162.00
10.	" " "	Shedd Investment Co.—Money advanced	3,007.21
11.	" " "	John I. Taminosan —refund of money paid to decedent in lifetime.	100.00
12.	" " "	Forest Lawn Cemetery—Mausoleum—expenditure authorized per order of court	21,000.00
13.	" " "	Federal Income Taxes owing by decedent	8,657.38
14.	" " "	C. V. Kenna—refund	12.50
15.	" " "	Albert Phillips—refund	25.00
16.	" " "	Geo. Schroeder for services	50.00
17.	" " "	R. W. Harbor for services	750.00
		See certificate of court attached.	
		Total	$45,100.19

(If more space is needed, insert additional sheets of same size.)

149-150

deceased and that said records show that the following claims were allowed against said estate and ordered paid:

Balance due on Porto Rican Bonds	$9,721.10
W. H. Herdman	350.00
Dr. A. D. Dunn	50.00
Dr. E. Holovchiner	890.00
Dr. A. K. Detweiler	100.00
Nicholas Senn Hospital	121.43
Drs. Condon & Nuell	100.00
Drs. W. O. & E. L. Bridges	25.00
Hess & Swoboda	162.00
Shedd Investment Company	3,007.21
Jno. I. Tanimosian	100.00
Forest Lawn Cemetery Asso. Mausoleum	21,700.00
Federal Income Taxes	8,657.38
C. V. Kenna	12.50
Albert Philips	25.00
Geo. Schroeder	50.00
R. W. Harbor	750.00

In witness whereof I have hereunto set my hand and official seal this 26th day of May, 1922.

Bryce Crawford, County Judge, by Clyde C. Sundblad, Clerk of the County Court. C54

Estate of GUSTAVE E. SHUKERT, District of Nebraska

SCHEDULE J.—Mortgages, Net Losses, and Support of Dependents

[fol. 152] Instructions

Mortgages.—Give location of property, name of mortgagee, date and term of mortgage, amount and unpaid balance, rate of interest, date to which interest was paid prior to death. Enter in second column accrued interest apportioned to date of death. Unsecured notes should be listed under Schedule I.

Losses.—Losses are strictly limited to net losses arising from fire, storm, shipwreck, or other casualty, or from theft to the extent that such losses are not compensated for by insurance. Losses must occur during the settlement of the estate. Depreciation in the value of securities does not constitute a deductible loss. In listing losses, specify nature. If insurance was received on account of loss, state the amount collected.

Support of Dependents.—No deduction may be taken under this item unless the local law permits the allowance, the local court has made a decree specifying the amount thereof, and in fact the allowance was reasonably required for the support of the person in question. In listing this item, give the names of the dependents and their relationship.

For further instructions see Article 47 et seq. and 61, Regulations No. 37, Revised, 1919.

Item No.	Mortgages.	Amount.	Accrued interest.
....	None.	$.....	$.....
	Total	$.....	$.....
	Grand Total		.....

(If more space is needed, insert additional sheets of same size.)

Item No.	Net losses during administration.	Amount.
....	None.	$..... $.....
	Total	$..... $.....
	Grand Total	.....

(If more space is needed, insert additional sheets of same size.)

Item No.	Support of dependents.	Amount.
1.	Allowance, per order of court to Elizabeth F. Shukert, widow, for her support and maintenance and support pending settlement of estate—certificate of court attached. This allowance is authorized by Sec. 1267 Revised Statutes Nebraska 1913.....	$6,000.00
	Total	$6,000.00

(If more space is needed, insert additional sheets of same size.)

J 11 C55

[fol. 153] COUNTY COURT, DOUGLAS COUNTY, OMAHA, NEB.

Bryce Crawford, Judge. Clyde C. Sundblad, Clerk

In the County Court of Douglas County, Nebraska

In the Matter of the Estate of GUSTAVE F. SHUKERT, Deceased

STATE OF NEBRASKA,
County of Douglas, ss:

I, Bryce Crawford, Judge of the County Court in and for said county, do hereby certify that I have examined the records now on file in said court in the matter of the estate of Gustave E. Shukert, deceased and that said records show that Elizabeth E. Shukert, widow was granted an allowance of $600.00 per month for her support and maintenance pending settlement of said estate, total allowance being $6,000.00.

In witness whereof, I have hereunto set my hand and official seal this 26th day of May, 1922.

Bryce Crawford, County Judge, by Clyde C. Sundblad, Clerk of the County Court.

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Estate of Gustave E. Shukert, District of Nebraska

SCHEDULE K—Property Identified as Taxed within Five Years

Instructions

Enter in this schedule, by separate estates if more than one estate is involved, the total amount deductible as representing property received from an estate taxed within five years or acquired by exchange for property so received, as set forth in Schedule G.

Important.—Care must be observed to enter in this schedule only the present value of the property actually received, or if such property has been exchanged for other property, the present value of such other property. Where the exchange was equal, the full present value should be entered. Where the decedent in acquiring such other property gave additional consideration, there should be deducted such proportion of the present value of the property acquired in exchange as the value of the original property bore to the entire consideration given.

For further instructions see Articles 50 et seq. and 62, Regulations [fol. 154] vised, 1919.

Item No.	Name of prior decedent	Address	Date of death	Amount
....	.....	None	.....	$.....
	Total.....	.....	.....	$.....

(If more space is needed, insert additional sheets of same size.)

Charitable, Public, and Similar Gifts and Bequests

When a deduction is claimed under this schedule, there must be submitted (1) certified copy of will or instrument of gift, (2) receipt or statement showing payment or acceptance, (3) affidavit of executor, showing whether will has been or will be contested, (4) such other document or evidence as may be specified by the Bureau.

For further instructions see Articles 53 et seq. and 63, Regulations No. 37, Revised, 1919.

Item No.	Name and address of beneficiary	Character of institution	Amount
....	..... None	.....	$.....
	Total.....	.....	$.....

(If more space is needed, insert additional sheets of same size.)

SCHEDULE L—Recapitulation, Rates of Tax and Tax Due, and Jurat

Schedule	Gross estate	Value
A	Real estate	$261,000.00√
B	Stock and bonds	106,036.03√
C	Mortgages, notes, cash, and insurance	400,267.79√
D	Other miscellaneous property	33,791.86√
E	Transfers	None.
F	Powers of appointment	None.
G	Property identified as taxed within five years	None.
	Total gross estate	$801,095.68√

Schedule	Deductions	Amount, $26,304
H	Funeral expenses	$5,553.60√
	Administration expenses:	
	Executor's fee	5,500.00√
	Attorney's fee	15,000.00√
	Miscellaneous	250.00√
[fols. 155 & 156] I	Debts of decedent	45,100.19√
J	Unpaid mortgages	None.
	Net losses during settlement	.....
	Support of dependents	6,000.00√
K	Property identified as taxed within five years	None.
	Charitable, public, and similar bequests	None.
	Specific exemption (resident decedents only)	50,000.00√
	Total Deductions	$127,403.79
	Total gross estate (within U. S. in nonresident estates)	801,095.68
	Total deductions (for nonresident see Schedule M)	127,403.79
	Net Estate for Tax	$673,691.89

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(Here follows Schedule M, marked side folio pages 157 and 158.)

[fol.159] Jurat for Executors and Administrators

We Elizabeth F. Shukert and Isabel C. Shukert the undersigned executrices administrat-, do hereby solemnly swear-affirm that on the 29th day of October, 1921, the County court at Omaha, Nebraska granted letters testamentary or of administration upon the estate of the foregoing named decedent to the undersigned; that we have made diligent search for property of ever- kind left by the decedent; that we have carefully read the instructions printed on this form; that hereon is listed all of the property, tangible and intangible. forming the gross estate of the decedent so far as it has come to

Deductions—Estate of Nonresident.

If the decedent was not a resident of the United States, Hawaii, or Alaska, no deductions whatever are allowable unless the value of that part of his gross estate situated outside of the United States, Hawaii, or Alaska be set forth. If it be desired to claim deductions, execute Schedules H-I-J-K and compute the deductions allowable as follows:

1. Value of gross estate in United States (Schedules A-B-C-D-E-F-G)	$	.....
2. Value of gross estate outside of the United States (attach itemised schedule showing values)	.....	.....
3. Value of total gross estate wherever situated (1 plus 2)	.....	.....
4. Gross deductions under Schedules H-I-J	.....	.....
5. Net deductions under Schedules H-I-J (that proportion of 4 that 1 bears to 3, not exceeding 10% of 1)	.....	.....
6. Schedule K (within the United States)	.....	.....
7. Total deductions allowable (5 plus 6)	.....	.....
8. Net estate taxable (1 minus 7)	.....	.....

Rates and Tax Due.

Net Estate.			Date of Death.....Sept. 29, 1921..... (Date)				
			(1) Sept. 9, 1916, to Mar. 2, 1917, inclusive.	(2) Mar. 3, 1917, to Oct. 3, 1917, inclusive.	(3) Oct. 4, 1917, to Feb. 24, 1919, inclusive.	(4) On and after Feb. 25, 1919.	Amount of tax.
Exceeding—	Not exceeding—	Amount of block.	Rate per cent.	Rate per cent.	Rate per cent.	Rate per cent.	
	$50,000	$50,000	1	1½	2	1	$ 500.00
$50,000	150,000	100,000	2	3	4	2	2,000.00
150,000	250,000	100,000	3	4½	6	3	3,000.00
250,000	450,000	200,000	4	6	8	4	8,000.00
450,000	750,000	300,000	5	7½	10	6	13,421.51
750,000	1,000,000	250,000	5	7½	10	8	.....
1,000,000	1,500,000	500,000	6	9	12	10	.....
1,500,000	2,000,000	500,000	6	9	12	12	.....
2,000,000	3,000,000	1,000,000	7	10½	14	14	.....
3,000,000	4,000,000	1,000,000	8	12	16	16	.....
4,000,000	5,000,000	1,000,000	9	13½	18	18	.....
5,000,000	6,000,000	1,000,000	10	15	20	20	.....
6,000,000	7,000,000	1,000,000	10	15	20	20	.....
7,000,000	8,000,000	1,000,000	10	15	20	20	.....
8,000,000	9,000,000	1,000,000	10	15	22	22	.....
9,000,000	10,000,000	1,000,000	10	15	22	22	.....
10,000,000	.....	.....	10	15	25	25	.....
Total Tax.....							$26,921.51

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our knowledge and information; that we have no knowledge of any transfers made or trusts created in contemplation of death or to take effect at or after death, except as stated on Schedule E; that to the best of our knowledge, information, and belief the value shown for each item of property listed hereon was the actual and full value of the same at the time of decedent's death; and that the debts, expenses, and charges entered hereon as deductions from the gross estate are correct and legally allowable.

Jurat for Beneficiaries, Custodians, and Trustees

I-We —— ——, the undersigned beneficiar- (Custodian—Trustee), do hereby solemnly swear-affirm that — have carefully read the instructions printed on this form; that hereon is listed all of the property, tangible or intangible, contained in the gross estate of the decedent which has come into — possession and control; that to the best of — Knowledge, information, and belief, the value shown for each item of property listed hereon was the actual and full value of the same at the time of the decedent's death; and that the debts, expenses, and charges entered hereon as deductions from the gross estate are correct and legally allowable.

(Name:) Isabel C. Shukert, (Address:) 2228 Larimore Ave. (Name:) Elizabeth F. Shukert, (Address:) 2228 Larimore Ave. (Name:) —— ——, (Address:) —— ——. (Seal illegible.)

[fol. 160] Subscribed and sworn to before me, at Omaha, Nebraska, this 27 day of June, 1922. Robert A. Nelson, Notary Public.

NOTE.—If there is more than one executor or administrator all must sign and swear to the return.

Attorney's name and address: W. H. Herdman, 1330 1st Nat. Bank Bldg., Omaha, Nebr.

15 C 60

O. F. #37-A

Et—1319-RKS.
District of Nebraska.
Estate of Gustave E. Shukert.
Date of death: September 29, 1921.
Tax Liability: $13,685.97.

May 25 '23.

Elizabeth F. Shukert et al., Executrices estate of Gustave E. Shukert, care of Collector, Omaha, Nebraska.

MESDAMES: A review and audit of the return on Form 706 filed for this estate and of the report of investigation discloses a total tax liability of $40,607.48. The return shows a tax liability of $26,921.51, which has been paid. The amount due is $13,685.97,

which should be paid to the Collector of Internal Revenue at Omaha, Nebraska, without delay, as Section 407 of the Revenue Act provides that the excess part of the tax shall bear interest at the rate of ten per centum per annum from the expiration of thirty days after the date of the receipt of this letter until payment is received by the Collector.

The return has been verified as correct except as to the following:

f 2

2—Estate of Gustave E. Shukert

Stocks and bonds:

Gross estate	Returned	Determined
$11,050.00, U. S. Liberty Loan Bonds ...	$9,752.73	$9,757.15
$2,050.00, U. S. First Liberty Loan.....	1,859.35	1,859.15
$8,100.00, U. S. Second Liberty Loan....	7,315.92	7,319.97

[fol. 161] Transfers:

The value of the following described property, transferred by decedent in his lifetime, is included in his gross estate, it having been determined after consideration of all the facts that such transfers are taxable under the provisions of the Federal Estate Tax Law:

$190,000.00, notes of Eleanor Peterson	0.00	151,400.00
$35,000.00, U. S. Fourth Liberty Loan	0.00	31,718.75
Accrued interest	0.00	7,024.53
	Determined	Returned
Difference between net estate returned and determined, to balance	190,151.55	

This letter shows the Bureau's determination of the estate tax liability of this estate, and assessment will at once be made on this basis. All questions relating to the discharge of this tax should be taken up direct with the Collector and not with this office.

Respectfully, (Signed) R. M. Estes, Deputy Commissioner.

NBM R. K. S. G. B. T. M. M. mf3

At this time, it being 5:00 o'clock p. m., a recess was taken until tomorrow, Tuesday, May 20, 1924, at 10:00 o'clock a. m.

Tuesday, May 20, 1924.—10:00 o'clock a. m.

Court convened pursuant to adjournment.

Further proceedings were as follows:

The Court: You may proceed further, gentlemen.

H. T. CUTLER, is here called and sworn as a witness on behalf of plaintiff. Being examined in chief by Mr. Mullen he testified as follows:

Q. What is your full name, Mr. Cutler?
A. A. T. Cutler.
Q. Were do you live?
A. 2761 California Street, Omaha.
Q. How long have you lived in Omaha?
A. Since 1904.
Q. What is your business?
A. I am connected with the United States Trust Company as Vice President, Omaha, Nebraska.
Q. That is the trust company connected with the United States National Bank?
[fol. 162] A. Affiliated with the United States National Bank.
Q. Did you know Mr. Shukert in his lifetime?
A. I did.
Q. How long had you known him?
A. I first became acquainted with Mr. Shukert—I can't give the year, but when I was Receiving Teller in the United States National Bank about, Oh, ten or maybe twelve years ago.
Q. Did you know him well?
A. Quite well.
Q. Did he do his banking business with the United States National Bank?
A. Yes, at that time.
Q. Did you see him every day when he came into the bank?
A. Not every day, but once or twice a week.
Q. Do you remember, Mr. Cutler, of talking with or seeing Mr. Shukert in the early winter of 1921?
A. Yes, sir.
Q. Did he talk with you about creating a trust?
A. Yes, sir.
Q. Now when was the first time he talked with you about that?
A. I can't give the exact date but it was real early in February, the real early part of February.
Q. 1921?
A. 1921.
Q. Did you learn that he had—you knew about this building in Omaha at 15th and Harney, this old Ramge Building?
A. Yes.
Q. And did you learn that it had been sold prior to that time?
A. Yes, sir.
Q. Was it shortly after that sale?

A Yes, because I was talking with him about that.

Q. Now tell the jury how he came to talk to you or how this thing started. The discussion about the creation of this trust?

A. Well, I had received information in talking with Mr. Harber—he came to see me something about a bond issue, and it sort of occurred to me that I might be able to land some business for our company, and I started talking "Trust" with Mr. Shukert in order to get his business for our company if possible.

Q. Did you learn that he had contemplated making a trust?

A. Just that he had funds that were available.

[fol. 163] Q. Now then, did you keep on negotiating or talking with him about the creation of this trust for some considerable period of time?

A. Yes.

Q. How long did this negotiation cover?

A. Two or three months that I was seeing him just as often as I could.

Q. Did the discussion and negotiation about it continue up to the time it was actually created?

A. Yes, sir.

Q. Was he in the Trust Company's office several times during that time?

A. Came in several times.

Q. Go ahead and tell the jury what he talked with you about with reference to the trust?

A. Well, it is more or less of a personal way, in the way that I was trying to sell him something that we had, and trying to get him to see where it was good for him, and we had several discussions. Mr. Shukert was rather of a funny or peculiar disposition, I might say, and I was sort of afraid of pushing him too hard on the matter so that many times when I would go to see him if I would step in the office and he would sort of gruffly say "Good morning" I would immediately go away, but if he would say "Come in, I want to talk to you," then I would go in and we would talk about the trust and along lines of that kind.

Q. Did he discuss with you the different provisions in this trust?

A. In a general way I think I went over all of them with him.

Q. Did you have an outline drawn up by you and Mr. Caldwell?

A. We had a sort of a tentative outline drawn up to submit to Mr. Herdman.

Q. Later on did you get the corrected copy?

A. That developed into the permanent trust.

Q. The one that has been exhibited here?

A. Yes, sir.

Q. Now during the time Mr. Shukert was over there discussing this thing with you preparatory to creating this trust, what, if anything, was said regarding his death—was there anything discussed about that?

A. Yes, those subjects quite often come up in such matters. I rather questioned Mr. Shukert's idea of leaving this amount of money tied up in such a manner for such a long term, which was

thirty years. Mr. Shukert said that he was good for fifteen or twenty years and that in five or ten years he would be able to know [fol. 164] more about the children's business ability and that Miss Isabel's business ability had been proven to him. As far as I knew he had entire confidence in her ability, but the younger daughter was in school and the boy was in the Omaha schools and the other daughter out of the city and he said that in five or ten years he would be able to get a better line on their business ability and at that time could make new arrangements if necessary.

Q. What did he say about the balance of his property—did you find out about the size of his estate in talking with him there?

A. I had a very good idea of the size of his estate.

Q. Now what was said about the placing of this in trust, whether the children would need these funds?

A. He said that he had plenty of money with which to take care of his children until that time, and I even had questioned why he, what he meant by that, and he said he could take care of them in the meantime and he would make provision so that in their old age they could have this to fall back on, provided that in the new arrangement they should dispose of all of it.

Q. What did he say about his death—whether he needed the funds and so on?

A. He told me that he would not need any funds; that he would be able to get this load off his mind and he could make more money. I even contemplated a second trust with him later on in order that they could get the income from it.

Q. I notice that there is a paragraph in the trust which provides for putting in additional funds?

A. Well, I don't remember the specific paragraph. I discussed a second trust with him whereby they could get the entire income, so we drew that trust in order that he could increase it.

Q. Was there anything said there about leaving this trust for the purpose of evading taxation?

A. No, that is not our business.

Q. Well, was there anything said about that by Mr. Shukert?

A. No, not a thing. I talked along the lines of it being an incentive for the children to save; that they could see how fast money would grow by leaving it where it would compound.

Q. What did he say about that?

A. It sort of appealed to him.

Q. Now what was his condition as far as you observed there during the time you saw him during all those years? Was there any [fol. 165] difference during the time he was making this trust than it had been prior thereto?

A. Not that I could see.

Q. What was his condition?

A. I thought he was a very hale and hearty man for his age.

Q. Was he the same as any other customers that came to the office as far as you could see?

A. Yes, sir.

Q. Was there anything you saw that made you think he was thinking of dying or contemplating death?
A. Not a thing.
Q. Did he say or do anything during all these negotiations that made you think that this arrangement was made for the purpose of making a testamentary disposition of his property?
A. No, sir.

Cross-examination.

By Mr. Lewis:

Q. Mr. Cutler, I understood you to say that learning Mr. Shukert had some available funds which he might place in trust you broached the matter of trust to him. Is that correct?
A. Yes, sir.
Q. Where was that matter first taken up?
A. I went over to his shop at 15th and Harney.
Q. What did he say about making a trust at that time?
A. Oh, just said he had some funds that he might put into a matter like that.
Q. And then you tried to sell him the trust?
A. Yes, sir.
Q. And finally he said he would make a trust?
A. Yes, sir.
Q. Then you went into the question of what kind of a trust?
A. Yes, sir.
Q. And you suggested some kind and he had some other arrangement and finally you arrived at this particular trust that was made?
A. Yes, sir.
Q. Now, Provision 5 which is referred to in that Trust is a provision relating to additional funds. That sort of a standard form that all trust companies use, isn't it?
A. Yes.
Q. Looking to the contingencies, put in irrespective of whether the man has an idea of putting in further funds or not?
A. I think we have one or two forms that have not that in there.
Q. Well, this was not discussed with you at that time?
[fol. 166] A. It was not discussed until we got down that far.
Q. Well, that is a standard form put in all trust deeds?
A. Yes.
Q. Now, this additional trust you speak of was entirely separate, that is, you had in mind a different kind of trust?
A. Yes.
Q. If he had added anything under Paragraph 5, it would not have complied with the additional trust you had in mind?
A. No.
Q. He couldn't have changed the form of this Trust at all?
A. No, sir; not at all.
Q. Anything he added to this would have been tied up?
A. Yes, sir.

Q. So, the thing you had in mind was some other kind of trust in which the income would come to the children.

A. Exactly.

Q. That Trust was never made in his lifetime?

A. No.

Q. That is the trust he made in his will?

A. I don't know what his will was. I don't remember only the general outline.

Q. Is your company one of the executors under that will or not?

A. I think we are to get the funds after they are placed in trust, but not as executor.

Q. Then you are named as trustee in the will?

A. Yes.

Q. The will does provide that during a certain period, the income, or part of it shall be paid to certain children or to the wife during their respective lifetime and after their death shall be distributed to their issue. That is in general the sort of trust you had in mind as the additional Trust that Mr. Shukert would in the future make?

A. No. Just simply placing in trust some funds which would not be irrevocable, which would be still within his grasp in case he needed them.

Q. Well, of course he couldn't make an irrevocable trust and will. But I mean the distribution of the income under the will is similar to what you had in mind for a future trust, isn't it?

A. Well, allowing for a sort of a monthly spending account.

Q. And you suggested at the time you talked of this Trust to Mr. Shukert—you mentioned some such future trust and possibility of it, didn't you?

A. Yes.

Q. Now, you said at the time you discussed with Mr. Shukert this trust, at the time you took it up with him, in the course of these [fol. 167] negotiations you told Mr. Mullen that death was mentioned several times. I don't want or mean to misquote you, but you mentioned the subject of death being brought up in the negotiations. Can you recall more definitely just how that phase of it entered into the negotiations?

A. Well, just when I questioned his idea of tying this up for thirty years.

Q. That was his idea——

A. (Interrupting). He said, "I am good for fifteen or twenty years, so it doesn't make any difference; I can take care of them until that is up."

Q. I don't see how that has any bearing on the thirty year provision?

A. My idea of that was that if he could take care of them for fifteen or twenty years that the estate that he would leave would surely cover the interim.

Q. He spoke of the fact that if they should dissipate the funds they would be cared for in their old age, didn't he?

A. Yes.

Q. In other words, he contemplated they would come into possession of his main fortune, and if they should dissipate that in their younger lives they would still have this?

A. If they should should dissipate it between the time they came into possession of it and the end of the thirty years.

Q. That some time they would come into possession of his major estate, that is, the part he did not put into this trust?

A. The other funds.

Q. And that if they should mismanage and dissipate that large part of his fortune, still, in their old age, they would be taken care of by this Trust Fund?

A. Yes, sir.

Q. That is what he had in mind?

A. I think so.

Q. No doubt about that, is there?

A. Not in my mind.

Q. I think you said something about Mr. Shukert's physical appearance, that is, you thought he looked like a "hale and hearty man" didn't you?

A. Well he was a man built along the lines of myself.

Q. Didn't you say you did not notice any indication of physical infirmity?

A. I did not.

Q. You didn't question him about that, did you?

A. No, sir.

Q. Hadn't any reason to, had you?

A. Not at all.

Q. You didn't care, did you, so far as this business was concerned, that is, I mean it had no bearing on this business from your point of view?

A. Not at all.

[fol. 168] Q. So he might have been a very sick man and you not know anything about it, isn't that true?

A. Oh, that is true.

Redirect examination.

By Mr. Mullen:

Q. Well, Mr. Cutler, the final negotiations for this trust were carried on with who in your company?

A. With Mr. Caldwell and Mr. Reed.

Q. That is after this preliminary copy had been made?

A. Yes, sir.

Q. And that was closed up with them?

A. Yes, sir.

Q. That was Mr. Abraham L. Reed and Mr. John Caldwell?

A. Yes, sir.

Witness excused.

Plaintiffs rest.

DR. JOHN S. GOETZ is here called and sworn as a witness on behalf of the United States. Being examined in chief by Mr. Lewis, he testified as follows:

Q. You are practicing physician in Omaha?
A. Yes, sir.
Q. Did you know Mr. Gustave E. Shukert in his lifetime?
A. Yes, sir.
Q. What, if any, professional relations had you with Mr. Shukert?
A. The only relations I had with him were as an examiner for an insurance company.
Q. Will you state when you examined him?
A. I can give you the date. I examined him four different times. The first time was September 23, 1910; second time, January 9, 1913; third time, April 1, 1915, and the last time, September 20, 1916.
Q. What was the result of the last examination you made of Mr. Shukert in September. 1916?
A. I have heard that he was rejected.

The Court: Well, we cannot consider that, that is hearsay and we will not consider it.

Q. On this examination in September, 1916, what did you find Mr. Shukert's physical condition to be?
A. He was practically the same as the other three examinations as far as I could determine. He seemed in good health.
[fol. 169] Q. That was so far as you could determine from your examination, Mr. Shukert seemed on all three examinations to be in good health?
A. With the exception that he gave a history of having had intermittent attacks of asthma.
Q. In the last examination did you make an examination of Mr. Shukert's urine?
A. No, sir.
Q. In respect to that what did you do?
A. Two samples of it were sent in to the Home Office of the company.

Witness excused.

HARRY O. STEEL is here called and sworn as a witness on behalf of the United States. Being examined in chief by Mr. Lewis, he testified as follows:

Q. Mr. Steel, did you know Mr. Gustave E. Shukert in his lifetime?
A. Intimately.
Q. Did you ever write any insurance for him?
A. Yes, I wrote him on four different occasions.
Q. Can you give the dates of those policies, approximately?

A. I can give them to you exactly. I wrote him first in September, 1910; then January, 1913; and the third time was March, 1915 and the last time was September, 1916 and he was rejected that time.

Q. He was rejected in September, 1916?

A. Yes.

Q. On the other three occasions he was accepted as an insurance risk?

A. Yes, sir.

Q. Did you notify him of the rejection?

A. Yes, sir.

Cross-examination.

By Mr. Mullen:

Q. When was that second policy issued?

A. The second one was in 1913, January, 1913.

Q. Then you say you were intimately acquainted with him, were you?

A. I was a tenant in his building for over seven years and saw him daily.

Q. Was that the last seven years of his life?

A. No, the seven years I was a tenant.

Q. When was that with reference to his death?

A. From January, 1910, until seven years later?

Q. Then you knew him after that, did you?

[fol. 170] A. Oh yes, saw him often.

Q. Tell us about his activities, was he active?

A. Yes, he was active.

Q. Could you see anything the matter with him as far as taking care of his business?

A. He told me something about his asthma but I saw him every day during the seven years I was in his building and never saw an indication of asthma that I would know it was asthma.

Q. Was this rejection based on asthma?

A. No, it was based party on that but it was based on finding casts in the urine.

Q. Did you talk with Mr. Shukert about this?

A. I did.

Q. What did he tell you about it?

A. I tried to impress upon him the seriousness of that trouble, not that it was active but that it might be, and I told him to go to his physican.

Q. What did he tell you?

A. After talking to me about two weeks he did not seem to think it amounted to anything but he did finally go to Dr. Edmiston.

Q. Did he tell you he talked about it to him?

A. Yes, he said he talked to Dr. Edmiston and Dr. Edmiston said there wasn't any casts and he came back to me and tried to make me think we didn't know anything about what we were talking

about and said Dr. Edmiston had given him some medicine that tasted like dishwater.

Q. How long was this after the company rejected him?

A. That was about two weeks after the company rejected him.

Q. But he did tell you his physician told you there was nothing the matter with him?

A. Yes.

Q. Did he try then to have you issue the policy ?

A. No, no, but he was trying to make me believe that our company didn't know what we were talking about.

Q. Did he tell you anything about that diagnosis, whether he believed it or not?

A. No. He sure didn't believe it.

Q. Did he tell you he thought that was going to kill him?

A. No, he sure didn't.

Witness excused.

HARRY FISCHER is here called and sworn as a witness in behalf of the Government. Being examined in chief by Mr. Lewis, he testified as follows:

[fol. 171] Q. What is your name?

A. Harry Fischer.

Q. And what is your business?

A. Lawyer.

Q. Did you know Gustave E. Shukert during his lifetime?

A. I did.

Q. Intimately?

A. Oh, I might say intimately, yes.

Q. Do you remember the occasion on which he sold the Railway Exchange Building?

A. Well, I remember the occasion.

Q. Did you have any conversation with him about that time?

A. I had a conversation with him prior to the time. I think he sold it some time in the spring of 1921, the exact time I cannot recollect.

Q. What did he say on that occasion?

A. Well, we talked about a great many things. He rapped on the window when I passed—I used to go down there to try to collect some rents for other parties and he tapped on the window and called me in. Well, there was nothing unusual about that, because he called me in every time he saw me going past the place, and when I got in there he talked about the Nebraska Finance Company, about—well, he was worried about not alone the dividends, but also the principal. Well, he talked a long time about that, and discussed some of his loans, and he showed me his little book in which he had marked the loans, and then, I don't know just what brought it about, but he just kind of went this way (indicating), and he says, "Fisher, I am about all in, I don't believe I will live very long, I am going to fix some property so my family

will never want," and that was practically all the conversation. I didn't want to press the matter—I was not his attorney. I knew Mr. Herdman was his attorney for a long period of time, and I did not want to press the matter any further.

Q. Now, did you ever have any later conversation with him relative to this trust agreement which he had executed?

A. I met Mr. Shukert coming out of the United States Trust Company's building which was right next to the United States National Bank Building, and I said to him—of course I always called him "Shukert" and he called me "Fisher"—I said, "What are you doing here, Shukert?" He says, "Well," he says, "I fixed everything up so my family will never want." So I said, "In a trust agreement?" He said, "In a trust agreement." I don't know just why but I presumed it was a trust agreement coming out of the trust company's building, or he said it.

[fol. 172] Cross-examination.

By Mr. Mullen:

Q. When was it you had the first conversation with him?

A. Oh, Mr. Mullen, I don't know. It might have been in March, or it might have been in February, or it might have been as late as April, I couldn't tell. I don't know the exact time because it might have been during the time I went down there in March, or it might have been in April, but I know this: It was four or five or six months before he died, because I didn't know that he was even sick.

Q. Well, it was after February, you say?

A. Until some friend called me and said, Mr. Shukert is very sick.

Q. This conversation was after February?

A. Yes sir, I think it must have been after February—I think it must have been.

Q. You are an attorney at this bar?

A. Yes sir.

Q. Now, this company that you talked about, Mr. Fisher, is a company you are interested in in some sort of way?

A. I am secretary of that company.

Q. Mr. Shukert had made an investment in that company?

A. Yes, sir.

Q. And he was alarmed about getting returns from that?

A. Yes sir.

Q. The fact is, the investment he made there was a losing one, wasn't it?

A. Well, that depends upon the frozen assets which we have at this time, whether it was a losing one or a winning one. It was a losing one in this respect, that it did not pay any dividends.

Q. What about the stock, has it any value?

A. Our last statement shows that the stock has a book value of $106.00, I think, and the real value, as we term it, of about $82.00.

Q. Well, didn't Shukert think it was of no value?

A. Well now, Mr. Shukert just—this is his exact language. He pointed to me and he says: "Now Mr. Fisher, never mind the dividends, but how about the principal," just like that. I said, "You go to Mr. Gruenig and he can tell you more about that than I can."

Q. He had reached a point where he wanted his principal back without any dividends?

A. Apparently.

Q. He was really alarmed that he had made an investment that he was about to lose?

A. I don't think he had any idea he was going to lose it all, but lose some.

[fol 173] Q. Now, this is the two hundred shares of Nebraska Cattle Company common, par value, $100.00, at $90.00, valued at $18,000.00 on the date of his death, that is the one, is it?

A. Yes, that is the one. That company of course, has changed its name, and it is now the Nebraska Loan & Finance Company.

Q. You never knew anything about—he did not consult you about this trust in any way?

A. No sir.

Q. You did not know whether it was a trust or what it was?

A. Well, I thought it was a trust agreement at the time, undoubtedly.

Q. You mean you said it was a trust?

A. Well, maybe I did—it was either me or him who said it when he came out of the Trust Company's building.

Q. When did you first learn that he had made a will?

A. That was after his estate was offered for probate.

Q. The first time you ever heard about that?

A. Yes sir. He never talked to me about any will.

Q. And you have related all you know about this trust?

A. Yes, that came up only incidentally.

Q. Now, this conversation you had, you think, was about—can you locate that a little closer?

A. No, I couldn't. I am under oath, and I can't tell you. It was sometime in the spring. It might have been six months before his death, or it might have been four months, but I think it was between March 1st and May 1st. It was somewhere in that time.

Witness excused.

Government rests.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well now, before we start in presenting the matter to the jury: Do I understand that there are two provisions of the Revenue Act here involved, both the provision which says that that part of an estate shall be taxable to the extent of an interest which the decedent has at any time made a transfer of to take effect in possession and enjoyment at or after his death—is that clause involved here?

Mr. Lewis: Yes sir.

The Court: Then, as I read it, that part of his estate is taxable of which he has made a transfer to take effect in possession and enjoyment at or after his death. Now, this gift was to take effect in possession and enjoyment at the end of thirty years, wasn't it?

[fol. 174] Mr. Mullen: The trust company took possession immediately.

Mr. Lewis: If the Court please, it does not make any difference when the trustee took possession.

The Court: No enjoyment on the part of the trustee.

The enjoyment is in the beneficieries, but that does not occur until thirty years unless the twenty-one year limitation should defeat that. It appears to me in reading that particular clause that no matter whether it is put in the hands of a trustee or how it is placed, if he puts it in such shape that the party for whom he is making it does not get it until after his death, that is, the death of the party making the trust, and that is the way he intended, that then it is part of his estate, and is taxable. It would not be claimed here on this evidence that Mr. Shukert expected or intended that he would be living at a time thirty years after his transfer. The other question is the one which I understand should ordinarily be submitted to the jury, that is, as to whether it is made in contemplation of death. That is not a question on which the court rules or expresses an opinion, hardly.

Mr. Mullen: The cases seem to be the other way on that.

The Court: Well, I have never had occasion to construe that clause which says that part of the estate shall be taxable which has been transferred with the intent of the transfer not taking effect in possession or enjoyment until after his death. It seems to me that where he turns it over to the trustee to have a mere naked holding on it until thirty years have gone by, that that means the beneficiaries are not to have possession and enjoyment until after his death. Therefore, the estate would be taxable. On the other question as to whether this was transfer in contemplation of death, I have frequently read the law about like this:

"By the term, 'in contemplation of death', is not meant on the one hand the general expectancy of death which is entertained by all persons, for every person knows that he must die. On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. The term, 'in contemplation of death', involves something between these two extremes."

And, to my mind, the question of whether the particular instance presents that situation is ordinarily left to the jury.

[fol. 175] Mr Mullen: The plaintiffs now move the Court to instruct the jury to return a verdict in favor of the plaintiffs and against the defendant.

Mr. Kinsler: The defendant, the United States moves the Court to instruct the jury to return a verdict for the defendant, on the ground that the undisputed evidence shows a trust agreement created

by Gustave E. Shukert in his life time which was intended to take effect in possession and enjoyment after his death.

At this time, it being the noon hour, a recess was taken until two o'clock P. M.

Tuesday, May 20, 1924—2:00 o'clock p. m.

Afternoon Session

Further proceedings were as follows:

The Court: If counsel care to be heard on the motions, I will hear them.

Whereupon, counsel for plaintiffs and counsel for defendant presented argument to the Court upon the respective motions.

The Plaintiffs then and there requested the Court to give to the jury the following instruction:

PLAINTIFFS' REQUESTED INSTRUCTIONS TO JURY

You are instructed that the deceased, Gustave E. Shukert, had a right to dispose of his property in such manner as he saw fit. He had a right to give it to his children outright or to give it to them in the form of a trust such as he provided in the trust deed that has been introduced in evidence. The laws of the United States provide that estate taxes shall be assessed on all property transferred or conveyed by the owner, without consideration, in contemplation of death. What the law intends to do and in effect does is to tax all property where the owner makes a testamentary disposition of the same.

But the Court refused to grant said request and refused to give said instruction,

To which refusal of the Court the plaintiffs then and there duly excepted.

The plaintiffs then and there requested the Court to give to the jury the following instruction:

[fol. 176] You are instructed that by the term "in contemplation of death" is not meant on the one hand that general expectancy of death which is entertained by all persons, for every person knows that he must die. On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. The term "in contemplation of death" involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind. But a transfer may be said

to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonable close future is the moving cause of the transfer.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the plaintiffs then and there duly excepted.

The plaintiffs then and there requested the Court to give to the jury the following instruction:

You are instructed that under the law applicable to the case, as made by the evidence, no presumption exists in favor of either party, and the sole issue for you to determine is whether the transfer of property made by the deed of trust in evidence was made by the deceased, Gustave E. Shukert, in contemplation of death. The law places the burden of proving that such conveyance was not made in contemplation of death upon the plaintiffs. If you find from the evidence that the deceased did not make and execute said deed of trust conveying said property in contemplation of death, then your verdict will be for the plaintiffs, and you should return a verdict for plaintiffs in the sum of $13,685.97 with interest thereon at the rate of one-half of one per cent per month from July 3, 1923.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the plaintiffs then and there duly excepted.

The plaintiffs then and there requested the Court to give to the jury the following instruction:

[fol. 177] You are instructed that if you find from the evidence that the deceased, at the time he made the trust deed which has been introduced in evidence and created said trust, did not make it in contemplation of death, then your verdict should be for the plaintiffs. You should find that there is due from the defendant to the plaintiffs the sum of $13,685.97, with interest thereon at the rate of one-half of one per cent per month from July 3, 1923.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the plaintiffs then and there duly excepted.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

To which refusal of the Court the plaintiffs then and there duly

The defendant then and there requested the Court to give to the jury the following instruction:

You are instructed that under the undisputed evidence the trust created by Gustave E. Shukert in his lifetime was intended to take effect in possession or enjoyment at or after his death and that your verdict should be for the defendant.

Which request was granted by the Court and the Court gave the jury said instruction.

To the granting of said request and to the giving of said instruction the plaintiffs then and there duly excepted.

The defendant then and there requested the Court to give to the jury the following instruction:

You are instructed that the undisputed evidence in this case is that Gustave E. Shukert intended that the trust which he created and which is in controversy in this action should not take effect in possession or enjoyment until at or after his death.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the defendant then and there duly excepted.

The defendant then and there requested the Court to give to the jury the following instruction:

Subject to the ruling of the Court upon the defendant's foregoing request, you are instructed that if you find as a matter of fact that the [fol. 178] trust fund created by Gustave E. Shukert during his lifetime and in controversy in this action was intended to take effect in possession or enjoyment at or after the death of said Gustave E. Shukert, then your verdict must be for the defendant.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the defendant then and there duly excepted.

The defendant then and there requested the Court to give to the jury the following instruction:

You are instructed that if you find that the trust created by Gustave E. Shukert during his lifetime was created in contemplation of death, then your verdict must be for the defendant.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the defendant then and there duly excepted.

The defendant then and there requested the Court to give to the jury the following instruction:

You are instructed that the burden is upon the plaintiff to produce such evidence as will show that, at the time he made the gift in question, the decedent, Gustave E. Shukert, did not think that he might die in the reasonably near future, and that if the evidence does not show this then their verdict must be for the defendant, although they shall find from the evidence that at the time the said gifts were made the decedent had reason to hope that he might not die in the near future.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the defendant then and there duly excepted.

The defendant then and there requested the Court to give to the jury the following instruction:

You are instructed that by the terms in contemplation of death is not meant on the one hand the general expectancy of death which is entertained by all persons, for every person knows that he must die. [fol. 179] On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. The term in contemplation of death involves something between these two extremes. It is not necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind, and in this case you may find that the transfers were made in contemplation of death if you shall find that the expectation or anticipation of death in either the immediate or reasonably near future was a moving cause of the transfers.

It is not necessary that there be direct evidence to show that the trust was created in contemplation of death, if from the facts and surrounding circumstances you may reasonably draw the inference that there was such contemplation. Among such facts and circumstances you are entitled to consider the evidence that Gustave E. Shukert was of an advanced age; that for many years prior to and up to the time he created this trust he had been a chronic sufferer from serious and dangerous afflictions which were of a nature that from them his death might suddenly occur at any moment; that he possessed a keen realization of his condition; that his death occurred about one year after the trust was created. This evidence, if believed, is reasonably susceptible of the inference that the trust was created in contemplation of death. You should also consider the fact that the statute raises a presumption that a transfer of a material part of a decedent's property within two years prior to his death is made in contemplation of death.

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the defendant then and there duly excepted.

The defendant then and there requested the Court to give to the jury the following instruction:

You are instructed that the provisions of the Revenue Law of 1918 applicable to this action are as follows: "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or [fol. 180] created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature

of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

But the Court refused to grant said request and refused to give said instruction.

To which refusal of the Court the defendant then and there duly excepted.

COURT'S INSTRUCTIONS TO JURY

And thereupon, the Court instructed the jury as follows:

The Court: There is a motion now by plaintiffs to instruct the jury to return a verdict for the plaintiffs, and there is, on the part of the Government, a request to instruct the jury to return a verdict for the defendant on the ground that the Government claims the undisputed evidence shows a trust created by Gustave E. Shukert in his life time which was intended to take effect in possession and enjoyment after his death, and those are the two motions or requests to which I will direct my attention.

The primary purpose undoubtedly of the Federal Inheritance Tax Law is to tax inheritances and lay a tax on the moneys that go from a decedent to his beneficiaries by will or descent. But that is not the whole purpose of the law. Such laws as preceded the Federal Act in many of the states, and the experience under them, had early demonstrated that where taxes, especially heavy taxes, were to be laid upon inheritances, that many things were done to bring about the devolution of property from an ancestor to children or kindred that did not come squarely within the law of inheritance. That had been made very apparent, and those interested in such matters were very familiar with at least several ways in which property was carried over from ancestor to children and kindred by other means than the operation of the law of inheritance, so that when the Federal Act came to be enacted it included at least some methods of which I may call devolution or transfer of property that were not strictly within the operation of the laws of inheritance. The first and most conspicuous matter that was covered in the law was to provide a tax on [fol. 181] gifts and transfers and deeds and trust that are made by a property owner in contemplation of death. Now, such gifts, transfers, deeds and trusts, independent of that Statute, did operate to create vested interest in praesenti immediately upon the execution. They were lawful, they were proper, they were well recognized, nothing wrong about them, all of them, or mostly all of them resulting from the natural affection of families, and all upheld by the law, all emminently proper but so nearly related to the operation of the law of inheritance that it was apparent that large sums would be exempted from the Statutes unless those means of transferring property were also mentioned and covered by the tax. So that was settled, that gifts, even through in praesenti, though creating rights in praesenti, were subject to tax if made in contemplation of death.

Now, the other provisions is that property of the decedent shall be subject to the tax if it appears that the decedent has at any time, whether before or after February 24, 1919, at any time created a trust intended to take effect in possession or enjoyment after his death.

Now, in this case it stands undisputed that Mr. Shukert did out of, as appears by the undisputed evidence, an unusual and extraordinary regard for the interest of those who had a claim upon his bounty and care, his children, make this trust in question, and did create it, turn it over to the United States Trust Company; that the terms of the trust were such that Shukert himself entirely parted with the title to his own property, and split the ownership of the property up into two parts, creating both a legal and equitable property therein, and that the nature of the trust was such that it operated in praesenti to confer both the legal and equitable title upon the parties designated—no question about that. But the time fixed, and that he had in mind for the beneficiaries of that trust to come into possession or enjoyment thereof, was a period thirty years beyond the time when he created the trust. It stands undisputed here that in the conversations he had with those who were helping him create this trust at his direction, he declared his purpose in a general way, sufficiently disclosed, or very clearly disclosed and corroborated anyway by the terms of the trust itself, that in the future, although he expected to be able to look after those children and their interests fifteen or twenty years, that he was looking beyond that time; that he had in mind the possibility of their losing even the large for-[fol. 182] tune that he had and would probably give them, but that even so when they were approaching old age—the daughter mentioned the words "old age"—that then in spite of what might happen prior to that, that at that time they would come into possession of it after his death.

Now, in the absence of an express provision of the Statute, a tax on inheritances certainly would not reach that conveyance, but it appears to me that the Statute has reached out after that identical trust and has used language that describes it exactly. It declares taxable the property where he has created a trust intended to take effect in possession or enjoyment—and that means and must mean when you read the context and have in mind what the act is about, that possession and enjoyment refers to the possession and enjoyment by the beneficiaries. Now, this trust was one in which the possession and enjoyment of it was to come to these beneficiaries long in the future, and, according to the undisputed evidence here, and the clear evidence, beyond any time that he expected to live himself. There is offered in evidence a table of expectancy that would show his average expectancy, if he was a well man at the time, to be some fifteen or sixteen years, seventeen at the outside. He said himself to Mr. Cutler that he might expect to live fifteen or twenty years, according to the testimony of the plaintiffs, but the time when these beneficiaries were to come into the enjoyment and possession of this particular trust was beyond that time, and beyond the time of his death. Now, I understand clearly, I think the argument

that is made here that this trust should be treated and considered as a gift in praesenti, the deferred feature of it merely concerning the equitable title, but that the legal title passes in praesenti. It is conceded that Shukert had a right to make an absolute gift at that time of his property and it would not have been taxable under the Statute, but that is not what he did, and this Statue was intended clearly, as it seems to me, to reach out beyond the ordinary operation of the law of inheritance and reach these transactions, proper transactions, lawful transactions, no question of that kind involved that there is anything wrong about it, and no trick about it, and no device or any intention to defeat any tax manifested here, but that the express language of the Statute reaches out beyond the ordinary operation of the law of inheritance and reaches and extends to these trusts which, at the time a man makes them, he has in mind and intent, shall come in and take effect in possession [fol. 183] and enjoyment after the time when he expects to live. Now, that is the extent to which the Statute, by its clear and absolute terms goes, and, although it is the law that in the interpretation of these tax statutes the law must be interpreted strictly so as not to enlarge the claims of the government, the intendments favorable to the citizen rather than to the Government in cases of doubt or ambiguity or uncertainty—that is the law. It is not the purpose of the Court in interpreting these Statutes to stretch a point so as to make taxes payable except where they come within the clear and specific letter and spirit of the law. It seems to me that that is where this trust comes. It is a trust created by Mr. Shukert which he intended to take effect in possession and enjoyment long after he should have passed away; after it might be that the large fortune which he had accumulated had been lost through misfortune or extravagance or waste, or things that might happen after that. His care went clear to the time when thirty years should have gone by. His care for his children reached clear to that point and he intended that at that time it should take effect. I don't think the defeasance clause of the trust agreement militates favorably to the plaintiffs. It is made lawful by the provision that if these beneficiaries should die or calamity should happen to them, that then other things should be done. But the intent and whole purpose in making up the trust was in the hope that they would live and at that time, after his death, they would come into the possession and enjoyment of the property.

Now, that being my view of it I will overrule the motion of plaintiffs and I will sustain the request of the Government to instruct the jury that the trust in question was a trust created by Gustave E. Shukert in his life time and was intended to take effect in possession and enjoyment at or after his death, and that therefore the verdict should be for the defendant.

I direct the jury to return a verdict for the defendant, and I ask Mr. Connelly to step forward here and sign the verdict for the jury.

Stipulation re Bill of Exceptions

It is hereby stipulated and agreed by and between Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave [fol. 184] E. Shukert, deceased, plaintiffs herein, and Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, defendant herein, that the foregoing bill of exceptions contains all of the evidence given or offered on the trial of the case of Elizabeth F. Shukert and Isabel C. Shukert, executrices of the estate of Gustave E. Shukert, deceased, Plaintiffs, vs. Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, Defendant, tried in the District Court of the United States for the District of Nebraska, Omaha Division, and correctly shows the proceedings had on said trial; that said bill of exceptions is correct in all respects; that the same may be signed, settled and allowed, and made a part of the record in said cause by Honorable J. W. Woodrough, the Judge who presided at the trial of said cause, without further notice to defendant or his counsel.

Arthur F. Mullen, W. H. Herdman, Attorneys for Plaintiffs.
James C. Kinsler, United States Attorney, Attorneys for Defendant.

Now, in furtherance of justice, and that right may be done, the plaintiffs present the foregoing as their bill of exceptions in this case, and pray that the same may be settled and allowed, signed and certified by the court, and made a part of the record in this cause as provided by law.

—— ——, Attorneys for Plaintiffs.

In United States District Court

Order Settling Bill of Exceptions—Filed July 21, 1924

The Foregoing Bill Of Exceptions contains all the evidence given or offered on the trial of the cause of Elizabeth F. Shukert and Isabel C. Shukert, executrices of the estate of Gustave E. Shukert, deceased, plaintiffs, vs. George B. Allen, Collector of Internal Revenue, District of Nebraska, Defendant, and correctly shows the proceedings had on said trial; and said bill of exceptions is correct in [fol. 185] all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

J. W. Woodrough, Judge who presided at said trial.

Dated at Omaha, Nebraska this 21 day of July 1924.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 21, 1924

Please prepare transcript on writ of error to the Circuit Court of Appeals, Eighth Circuit, same to contain the following record:

1. Petition.
2. Answer.
3. Trial proceedings in said case of May 19-20, 1924.
4. Opinion of court.
5. Verdict of jury.
6. Judgment on verdict.
7. Assignment of errors.
8. Petition for writ of error.
9. Order allowing writ of error.
10. Writ of error.
11. Bond,
12. Citation.
13. Bill of Exceptions.
14. Præcipe for Transcript.
15. Clerk's Certificate.

Arthur F. Mullen, W. H. Herdman, Atty-. for Pltffs.

[File endorsement omitted.]

[fol. 186] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE—Filed August 14, 1924

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the foregoing writ of error and in obedience thereto, and in compliance with the Præcipe, a copy of which is found on page 266 hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record in said court, as mentioned in said præcipe and as indicated in the foregoing index, in the case of Elizabeth F. Shukert and Isabel C. Shukert, executrices of the estate of Gustave E. Shukert vs. Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, No. 1554 Law, and that copies of the writ of error and citation, duly certified, have been lodged and remain in my office as such clerk.

Witness my hand and the seal of said Court at Omaha, in said District this 12 day of August A. D. 1924.

R. C. Hoyt, Clerk. (Seal U. S. Dist. Court, Dist. of Nebr., Omaha Div.)

[File endorsement omitted.]

[fol. 187] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 6768

ELIZABETH F. SHUKERT et al., Executrices of the Estate of Gustave E. Shukert, Plaintiffs in Error,

vs.

ARTHUR B. ALLEN, Collector, etc.

The Clerk will enter my appearance as counsel for the Plaintiffs in Error.

Arthur F. Mullen, Omaha, Nebr.

APPEARANCES OF COUNSEL

(Appearance of Mr. W. H. Herdman as Counsel for Plaintiffs in Error—Filed August 18, 1924)

The Clerk will enter my appearance as counsel for the Plaintiffs in Error.

W. H. Herdman.

[File endorsement omitted.]

[fol. 188] (Appearance of Counsel for Defendant in Error—Filed September 26, 1924

The Clerk will enter my appearance as Counsel for the Defendant in Error.

James C. Kinsler, United States Attorney. T. H. Lewis, Special Attorney Bureau of Internal Revenue. George A. Keyser and Andrew C. Scott, Assistant United States Attorneys.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS, DECEMBER TERM, 1924

ARGUMENT AND SUBMISSION

Thursday, January 22, 1925.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Arthur F. Mullen for plaintiffs in error, continued by Mr. T. H. Lewis, Special Attorney, Bureau of Internal Revenue, for defendant in error, and concluded by Mr. Arthur F. Mullen for plaintiffs in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 189] IN UNITED STATES CIRCUIT COURT OF APPEAL

[Title omitted]

Before Stone and Kenyon, Circuit Judges, and Scott, District Judge

OPINION—Filed May 16, 1925

SCOTT, District Judge, delivered the opinion of the Court.

This is an action by the executrices of the estate of Gustave E. Shukert against Arthur B. Allen, Collector of Internal Revenue for the District of Nebraska, to recover $13,685.47 additional estate tax under the Act of 1918. On May 5, 1921, Gustave E. Shukert transferred to the United States Trust Company by trust deed securities aggregating $225,000.00, face value, now valued by the [fol. 190] Commissioner of Internal Revenue at $190,157.55. The trust deed was for the benefit of his three children, and the fund was to accumulate for a period of thirty years, subject to slight diminution in case of certain remote contingencies.

We quote the material portions of the deed of trust:

"1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty (250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. Any and all such sums paid in this manner to any of the beneficiaries hereinafter named shall constitute a charge upon and shall be deducted from their share, or the share they would have taken if living, of the Trust Fund at its termination.

"2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate

twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above named children of the Founder shall die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such issue, if one the whole, if more than one then equal shares, provided, however, that such issues shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in [fol. 191] trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above named beneficiaries shall die without issue before the termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita."

The case involves interpretation of Secs. 401 and 402 of the Revenue Act of 1918. The portions of these sections material are as follows:

Sec. 401. "* * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Sec. 403), is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or non-resident of the United States: (Here follows a schedule of the percentages to be applied)."

Sec. 402. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

* * * * * * *

"(c) To the extent of any interest therein of which the decedent at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of, or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

The trial Court held that the deed created a trust intended to take effect in possession and enjoyment after the death of the grantor. [fol. 192] The grantor at the time of the execution of the deed was fifty-seven years old with an expectancy of about sixteen years.

The contention of counsel for plaintiffs in error is, that the trust created took effect in possession and enjoyment immediately on its execution. The theory of counsel for plaintiffs in error seems to be that inasmuch as the grant and trust were irrevocable and passed entirely from the control of the grantor, it must necessarily take effect in praesenti and therefore in possession and enjoyment. We think throughout the argument counsel for plaintiffs in error confuses the expression "transfer" with the expression "trust." Of course in this case the creation of the trust involved a transfer, but the transfer was no part of the trust, strictly speaking. It will be noted that Subdivision (c) of Sec. 402 of the Act provides: "To the extent of any interest therein of which the decedent at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of, or intended to take effect in possession or enjoyment at or after his death * * * ." Now of course the transfer in this case took effect immediately, but the trust created, we think clearly was intended to take effect in possession and enjoyment after the death of the grantor. The confusion of counsel for plaintiffs in error we think is made apparent in the concluding paragraph on page nine of his brief. It is there said: "Plaintiffs contend that the transfer of property made by the decedent by the trust deed of May 5, 1921, was not a transfer intended to take effect in possession or enjoyment at or after the death of the decedent and, therefore, the value of the property so transferred is not to be included in the value of the gross estate of the decedent. The precise question therefore presented is this: Was the transfer made by Shukert by the deed of trust of date May 5, 1921, a transfer intended to take effect in possession or enjoyment at or after Shukert's death? If so, the judgment below is right and should be affirmed; if not, the judgment below is wrong and should be reversed."

Now, we submit that the precise question was not as stated. The question is, not whether the transfer was intended to take effect, etc., but: Was the trust created intended to take effect in possession or enjoyment at or after Shukert's death? We think the trial Court was correct in his holding and judgment and that his opinion sets forth the proper theory with exception of one statement. On [fol. 193] page 181 of the printed record near the lower part of the page the trial Court says, "the nature of the trust was such that it operated in praesenti to confer both the legal and equitable title upon the parties designated—no question about that." We think the Court was wrong here. We think while the legal title vested in praesenti under the trust deed, the equitable title was held in suspension. There was no assurance that any one of the children would ever take the legal title to any part of the fund. Let us suppose that one of the children died before the expiration of the thirty year period leaving a spouse surviving and issue. In such case the spouse would take no part but the child would take the

entire share directly under the deed of trust. Or, suppose such child should die leaving neither spouse nor issue, the share would pass to the survivors directly under the deed of trust, and not by descent to the heirs of the deceased child. To illustrate: suppose that the child should die before the mother, the mother would be a direct heir of such child, it having left no issue, but the mother would take no part of the fund. We think clearly the equitable estate remains in suspension, and that the trust fund was intended to take effect in possession or enjoyment after the death of the grantor, and is therefore subject to the tax.

We think the case should be and is affirmed.

[fol. 194] In United States Circuit Court of Appeals

[Title omitted]

Judgment—May 15, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, have and recover against Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, the sum of twenty dollars for his costs herein and have execution therefor.

May 15, 1925.

[fol. 195] In United States Circuit Court of Appeals

Clerk's Certificate

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals where Elizabeth F. Shukert, et al., Executrices of the Estate of Gustave E. Shukert, were Plaintiffs in Error and Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, was De-

fendant in Error, No. 6768, as full, true and complete as the originals of the same remain on file and of record in my office.

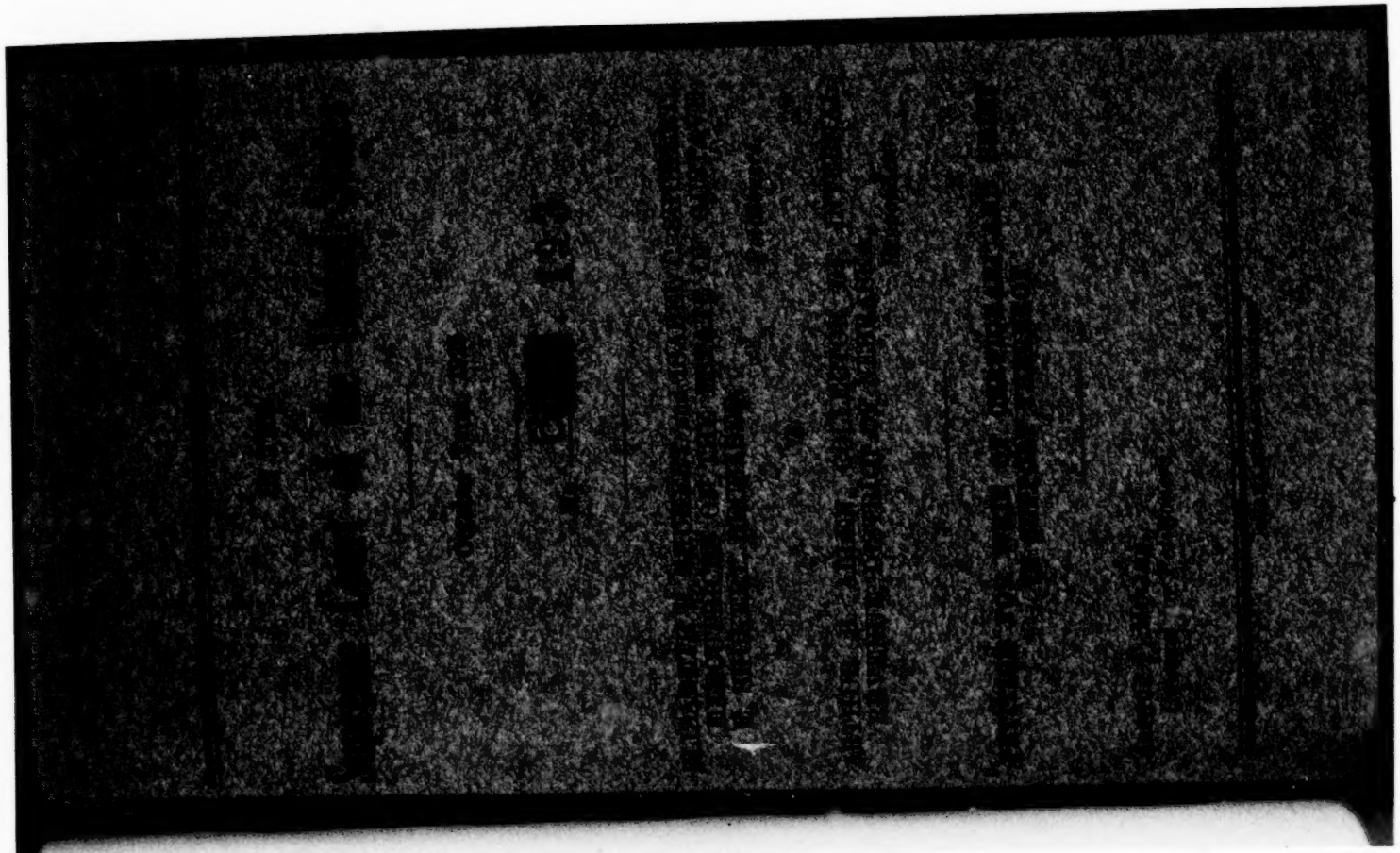
In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventh day of July, 1925.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal of United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 196] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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IN THE

Supreme Court of the United States

October Term, 1925

No. ———

ELIZABETH F. SHUKERT and ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The above named petitioners, Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, deceased, pray for a writ of certiorari to review the order and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, filed May 16, 1925, in a cause heard and determined in said court on a writ of error from the judgment of the District Court of the United States for the District of Nebraska and entitled Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, Deceased, plaintiffs in error, and Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, defend-

ant in error. (See *Shukert vs. Allen,* 300 Fed. 754.) A certified copy of the record and proceedings thereof are filed and presented herewith.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

In this action petitioners sued respondent to recover the sum of $13,685.47, alleging the same to have been erroneously and wrongfully assessed against and collected from the estate of petitioners' decedent as an estate tax under the provisions of the Revenue Act of 1918.

The case involves the construction, and application to the facts disclosed by the record, of so much of the following provisions of the Act of Congress known as "Revenue Act of 1918," whereby a tax is imposed upon the net estate of every decedent dying after the passage of said Act, as requires to be included in the "value of the gross estate," the "value" of property "with respect to which" the decedent "has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death":

> Section 401. "* * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Sec. 403), is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: (Here follows a schedule of the percentages to be applied."
>
> Section 402. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real and personal, tangible or intangible, wherever situated—
>
> (a) to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate * * *
>
> (c) to the extent of any interest therein of which the decedent at any time made a transfer, or with respect

to which he has at any time created a trust in contemplation of, *or intended to take effect in possession or enjoyment at or after his death.* * * *"

The facts are undisputed, and, briefly, may be stated as follows:

On May 5th, 1921, Gustave E. Shukert transferred to the United States Trust Company by trust deed, absolute in form, certain securities—consisting of liberty bonds and notes secured by real estate mortgages—of the par value of $225,000.00, but, as found by the Revenue Department, for "federal estate tax" purposes, to be of the actual value of $190,157.55. The conveyance was in trust for the use and benefit of the grantor's three children, with no reservations of any nature in favor of the grantor. The conveyance took immediate effect, was accompanied by delivery of the property conveyed, was purely voluntary and without monetary consideration.

Reference to said trust deed (R. 28-31) shows:

(a) there was a transfer of property, that is to say, Shukert thereby transferred to the trustee, for the use and benefit of the beneficiaries named, certain property;

(b) the income of the trust fund so created is to accumulate in the hands of the trustee until the termination of the trust, that is to say, apart from certain minor payments authorized to be made to Shukert's wife and children sufficient to pay "for the bare necessities of life" in case of their "extreme destitution," the income of the trust fund is to accumulate until the termination of the trust;

(c) the trust is to continue for a period of approximately thirty years, that is to say, the trust is to terminate on February 1st, 1951, unless the death of the last survivor of the beneficiaries named shall have occurred more than twenty-one years prior to February 1st, 1951, in which case

the trust is to terminate twenty-one years after the death of such last survivor;

(d) the sole beneficiaries of the trust are Shukert's three children, that is to say: at the termination of the trust, all the principal and accumulated income therefrom is to be paid, share and share alike, to said three children and to the survivor or survivors of them, provided the issue of any deceased child shall take the share such deceased child would have taken had he or she survived;

(e) the trust is fixed and unalterable, that is to say, there is no power reserved to Shukert or any other person to change, modify or alter any of the terms or conditions of the trust;; likewise, there is no reservation of power or control, either absolute or advisory, on the part of Shukert; likewise, there is no reservation, on the part of Shukert or any other person to revoke or annul said trust in whole or in part;

(f) the trust took effect, as to the decedent Shukert, in title, possession and enjoyment at the time of its creation, that is to say, the title, possession and enjoyment of the trust estate passed, and was intended to pass, irrevocably, from Shukert on May 5th, 1921.

At the time of the creation of said trust Shukert was fifty-six years of age, and had a life expectancy of about sixteen years. His family consisted of himself, his wife, age 52, two daughters, age 27 and 21, respectively, and a son, age 15. Shukert was then, and for many years past had been, engaged in the wholesale and retail fur business and had amassed a considerable fortune. At the time of his death, which occurred a few months afterward, he was possessed of a gross estate, exclusive of the property conveyed in trust as aforesaid, of a little more than $800,000.00, of which more than $500,000.00 was liquid assets consisting of stocks, bonds and mortgage notes.

On September 29th, 1921—four months and twenty-four days after creating said trust—Shukert died, testate. By his will, made two days before his death, he disposed of all the estate of which he died seized and appointed petitioners as executrices of his estate. The petitioners, as such executrices, duly filed with the respondent, as Collector of Internal Revenue, in the manner and form required by the Revenu Act of 1918, the return of said estate for federal estate taxes and paid the estate taxes due on the return so made. In said return the petitioners did not include in the "gross value of the estate of decedent" the property transferred by the trust deed aforesaid.

Afterward, on the final audit and review of the return so filed by the petitioners, the Commissioner of Internal Revenue included in "the gross value of the estate of decedent" the property transferred by the trust deed aforesaid, and found the value of said property to be $190,157.55 and assessed an additional estate tax against said estate on account thereof in the sum of $13,685.47. The petitioners paid said additional tax, under protest, made claim for refund, and said claim being rejected by the Revenue Department brought this action against the respondent to recover the additional estate tax so paid. The ground of petitioners' action being that the transfer of property and trust made and created by the trust deed of May 5th, 1921, was not "in contemplation of or to take effect in possession or enjoyment at or after his death" and, therefore, the inclusion of the value of the property so transferred in the gross estate of the decedent was wrongful illegal and without authority of law.

The trial court, on motion of respondent, instructed the jury to return a verdict in his favor, for that: the trust created by Shukert in his lifetime was intended to take effect in possession or enjoyment at or after his death. Reference to the trial court's opinion in ruling on the motion for a directed verdict (R. 180-183) shows that said court held:

the terms and nature of the trust were such that it operated to vest both the legal and equitable estate upon the parties *in praesenti;* the words "intended to take possession or enjoyment at or after his death," as found in sub-par. (c), Sec. 402, as applied to trusts, has reference to possession or enjoyment by the beneficiaries and not the grantor; and inasmuch as the trust was to continue and the income thereof to accumulate, and neither possession nor enjoyment thereof to come to the beneficiaries until the expiration of a period "beyond any time that he (Shukert) expected to live himself," therefore, the trust was intended by Shukert to take effect in possession and enjoyment after his death, within the meaning of the provisions of Sub-par. (c), Sec. 402 and, hence, the value of the property so transferred was to be included in the value of decedent's gross estate and taxed accordingly.

THE DECISION OF THE CIRCUIT COURT OF APPEALS

In its opinion (R. 189-193), the Circuit Court of Appeals, in affirming the judgment below, without comment or further exposition of the law, adopted the opinion of the trial court; that is to say: the Circuit Court of Appeals said:

> "We think the trial court was correct in his holding and judgment and that his opinion sets forth the proper theory with exception of one statement."

The exception was as to that part of the trial court's opinion which stated that the nature of the trust was such that it operated *in presenti* to confer both the legal and equitable title upon the parties designated. As to that the Circuit Court of Appeals said:

> "We think the court was wrong here. We think while the legal title vested *in presenti* under the trust deed, the equitable title was held in suspension. There was no assurance that any one of the children would ever take the legal title to any part of the fund."

It thus appears from the opinion of the Circuit Court of Appeals that said court likewise held that the words "intended to take effect in possession or enjoyment at or after his death" as used in Sub-par. (c), Sec. 402, as applied to trusts, has reference to possession or enjoyment by the beneficiaries and not by the grantor; and that inasmuch as the trust was to continue and accumulate and neither possession nor enjoyment thereof to come to the beneficiaries, until the expiration of a period beyond any time Shukert himself expected to live, the trust was one intended to take effect in possession and enjoyment after Shukert's death within the meaning of the provisions of Sub-par. (c), Sec. 402, and, therefore, the value of the property so transferred was to be included in the gross value of the decedent's estate and taxed as such.

On the record this question is presented: Is a trust created by a decedent with respect to certain property—a trust "intended to take effect in possession or enjoyment at or after his death" within the meaning of Sub-par. (c), Sec. 402, Revenue Act of 1918, and, hence, the value of the property "with respect to which" the trust was created is to be included in the "gross estate" of decedent and the estate taxed accordingly, it appearing that:

(a) The trust was created by trust deed whereby decedent transferred certain property to the trustee without reservation of right, title or interest therein or to the income therefrom;

(b) The fund was to accumulate in the hands of the trustee for a fixed term of years (about thirty years) and at the expiration thereof the fund and all accumulations thereof to be paid by the trustee to the beneficiaries named in the trust deed;

(c) The decedent at the time of the creation of the trust having a life expectancy of several years (about sixteen years) and he himself expecting to live that long or longer;

(d) The term of the trust, however extending beyond his life expectancy, beyond the time he himself expected, or could reasonably expect to live, and he, in fact, dying a few months after creating the trust?

The Circuit Court of Appeals answered the question in the affirmative to the prejudice of the petitioners and, as petitioners believe, in so doing, misconceived and misapplied the law.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Because the case involves an important question of federal law which has not been, but should be, settled by this court.

2. Because, in view of the large number of trusts created by various persons in all parts of this country, the question involved herein is of such general and material importance and interest that it should be settled by this court.

3. Because the question involved in and presented by this case is the legal and just construction and effect of the provisions of the Revenue Laws of 1918 and 1924 pertaining to "estate taxes," and should be authoritatively and finally adjudged and settled by this court upon and after a full presentation to it of the merits of the question.

The question is one of taxation. This is ever a matter of concern and importance to both government and citizen.

The question arises under the Act of Congress known as the "Revenue Act of 1918," and involves the construction and application, particularly of Sub-par. (c) of Sec. 402, of said Act; hence, is a question of federal law. Sub-par. (c), Sec. 402, Revenue Act of 1918, and Sub-par. (c), Sec. 302, Revenue Act of 1924, are identical in terms; hence the question is equally important and federal under the latter Act.

This court has not decided this question. It should do so. No other tribunal can give a final and authoritative decision, binding alike on government and citizen, and thereby establish a correct construction and a uniform operation of the Act throughout the United States.

The application and allowance of the writ is sanctioned by the precedents of this court.

Edwards vs. Slocum, 204 U. S. 61, was heard on Certiorari to the Circuit Court of Appeals for the Second Circuit. The case was under the Revenue Act of 1918. The only question involved was, whether in computing the amount of "estate tax" to be paid the amount of the tax was to be deducted from the exemptions, thereby adding the amount of the tax to the taxable estate. This, of course, was but a question of the construction of the Revenue Law of 1918.

United States vs. Merriam, 263 U. S. 179 was heard on Certiorari to the Circuit Court of Appeals for the Second Circuit. The case was under the Revenue Act of 1913, and the only question involved was, whether bequests in decedent's will to his executors, in lieu of their services as such, was compensation for services and, therefore, taxable as income. This likewise was a construction and application of the revenue laws.

Weis vs. Stern, 265 U. S. 242, was heard on Certiorari to the Circuit Court of Appeals for the Sixth Circuit. The case was under the Revenue Act of 1916. The question in the case was, whether the income tax law of 1916 required the contributors to a corporation created for charitable uses and purposes, no part of whose net income is for the benefit of any private stockholder or individual, to pay a tax on the income of a residuary estate devised to it, the devise being subject to the payment of certain annuities, all of the annuitants save one being dead. This, too, was but a question of the construction and operation of the revenue law.

Lederer vs. Stockton, 260 U. S. 3, was heard on Certiorari to the Circuit Court of Appeals for the Third Circuit. The case was under the Revenue Act of 1916. The question in the case was, whether the income tax law of 1916 required the contributors to a corporation created for charitable uses and purposes, no part of whose net income is for the benefit of any private stockholder or individual, to pay a tax on the income of a residuary estate devised to it, the devise being subject to the payment of certain annuities, all of the annuitants save one being dead. This, too was but a question of the construction and operation of the revenue law.

Smietanka vs. First Trust & Savings Bank, 257 U. S. 602. This case was heard on Certiorari to the Circuit Court of Appeals of the Seventh Circuit. The case was under the Revenue Law of 1913. The question presented was, whether under the income tax law of 1913 income held and accumulated by a trustee for the benefit of unborn and unascertained persons was taxable. This, likewise, was but a construction and operation of the revenue law.

Lederer vs. Fidelity Trust Company (decided January 26, 1925), 69 L. ed. 234, was heard on Certiorari to the Circuit Court of Appeals for the Third Circuit. The case arose under the Revenue Act of 1918. The question involved was, whether certificates representing the interests of subscribers to a railroad equipment trust, which are to be paid out of rentals for the equipment, are corporate securities, within the meaning of the Revenue Act of 1918 imposing a stamp tax on corporate securities.

McCaughn vs. Ludington (decided April 13, 1925), 69 L. ed. 463, was heard on Certiorari to the Circuit Court of Appeals for the Third Circuit. The case arose under the income tax provisions of the Revenue Act of 1918 and presented a question as to deductible losses sustained from the sale of property acquired before March 1st, 1913.

Irwin vs. Gavit (decided April 27, 1925), 69 L. ed. 546, was heard on Certiorari to the Circuit Court of Appeals for the Second Circuit. The case arose under the income tax act of 1913. The question presented was, whether income paid to the beneficiary under a bequest to trustees to pay the income to a specific person for a series of years, with remainder over, is taxable to the beneficiary as income under the act of 1913 and not exempt as property acquired by bequest.

Your petitioners present herewith as a part of their petition a brief showing more fully their views upon the questions involved.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said court of appeals in this case which is entitled in that court "Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, Deceased, Plaintiffs in Error, vs. Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, Defendant in Error," to the end that said cause may be reviewed and determined by this court, as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate.

ELIZABETH F. SHUKERT AND
ISABEL C. SHUKERT,

Executrices of the Estate of Gustave E. Shukert, Deceased, Petitioners.

By .....

Counsel for Petitioners.

STATE OF NEBRASKA }
} ss.
COUNTY OF DOUGLAS }

I, Arthur F. Mullen, being duly sworn, depose and say that I am the counsel named in the foregoing petition; that I have read the petition, know the facts therein contained and that the same are true, to the best of my knowledge and belief.

Arthur F Mullen

Subscribed and sworn to before me this .....day of July, 1925.

.....

Notary Public.

Counsel's Certificate of Merit

I hereby certify that I have examined and read the foregoing Petition for Writ of Certiorari; that in my opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

Arthur F Mullen

Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1925

No. ———

ELIZABETH F. SHUKERT and ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF NEBRASKA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

IMPORTANCE OF QUESTION INVOLVED

The amount of property involved in similar trusts; the number of persons interested in these trust estates; the proper administration of the law relating to the taxation of trust estates makes the question involved herein material and important. Until there is a decision by this court on the question presented there will be doubt and uncertainty in the administration of the estate tax laws. The question involved is nation-wide in its application. The right to levy and collect taxes on this class of property and the duty to pay the taxes levied make a decision by this court necessary.

The cases cited in the application for the writ state the familiar rule that tax laws are strictly construed against the taxing power. The taxpayer is given the benefit of any doubt. This rule applies not only to the power to levy the tax, but also to the interpretation and the method of administering the law. It is not necessary to cite cases on the familiar rule that the courts will not extend the application of a tax law to cover either property or persons that are not clearly within its provisions. It follows from this that a writ of certiorari should be allowed in revenue cases where there is any doubt, uncertainty or ambiguity in the revenue law.

The question presented in the case at bar involves the construction of a paragraph in the federal estate tax law. It involves the power of the federal governmtnt to tax an important class of property. Notwithstanding that this question is important and far reaching, *neither the respondents nor the petitioners have found any case either in state or federal courts that decides the precise question presented herein.*

While the issuance of the writ is discretionary, its employment in the case at bar is necessary to maintain harmony and uniformity in the administration of a federal revenue law. The petition exhibits a case in which the powers of the government and the rights of taxpayers can only be fixed through a review and decision by this court.

POINTS AND AUTHORITIES

I.

Writ of Certiorari in revenue case where question involved is of importance and general interest is generally allowed.

Edwards vs. Slocum, 204 U. S. 61.
United States vs. Merriam, 263 U. S. 179.
Weis vs. Stern, 265 U. S. 342.
Lederer vs. Stockton, 260 U. S. 3.
Lederer vs. Fidelity Trust, 69 L. ed. 234.
McCaughn vs. Ludington, 69 L. ed. 463.
Irwin vs. Gavit, 69 L. ed. 546.

II.

If there is any doubt in the construction or operation of a revenue law that doubt must be resolved against the government and in favor of the taxpayer.

Gould vs. Gould, 245 U. S. 151, 153.
United States vs. Merriam, 263 U. S. 179.
Schwab vs. Doyle, 258 U. S. 529.
Baltzell vs. Mitchell, 3 Fed. (2d ed.) 428.
Shelton vs. King, 229 U. S. 90.

III.

Trust created was fully executed. Immediate enjoyment and possession passed to trustee and beneficiaries.

Pomeroy's Equity, Vol. II, 2nd ed., pars. 1001, 996, 997, 998.
Bath Savings vs. Hathorn, 88 Me. 132, 32 L.R.A. 377.
Iness vs. Potter, 130 Minn. 320, 153 N. W. 604.
Note in 3 L.R.A. 902.
Allen vs. Hedrick, 206 Pa. 733, 740.
Lewis vs. Curnutt, 106 N. W. 914.
In re Podhajsky's Estate, 115 N. W. 590.
Haxton vs. McClaren, 132 Ind. 235, 31 N. E. 48.
Board of Trustees vs. Dimmitt, 87 S. W. 536, 113 Mo. App. 41.
Ward vs. Sage, 185 Fed. 7.
Title Guarantee vs. Ward, 164 Fed. 459, 184 Fed. 449.
Revenue Act of June 13, 1898, Chap. 448, U. S. Comp. St. 1901, pp. 2307, 2308.
Coolidge vs. Nichols, 4 Fed. (2nd ed.) 112.

IV.

Estate Conveyed Is Vested, Not Contingent.

In re McClelland's Estate, 70 Atl. 737, 221 Pa. 261.
Rhode Island Hospital vs. Noyes, 26 R. I. 323, 58 Atl. 999.
In re Long's Estate, 228 Pa. 594, 77 Atl. 924.
8 Words and Phrases, 1st ed., 7320.
4 Words and Phrases, 2nd ed., 1157.
Lines vs. Lines, 142 Pa. St. 149, 24 Am. St. Rep. 407.

V.

Transfer was not intended to take effect in possession or enjoyment at or after death, within the meaning of the terms used in Act of 1918.

Y. M.C. A. vs. Davis, 264 U. S. 47, 68 L. ed. 337.
Edwards vs. Slocum, 264 U. S. 61, 68 L. ed. 313, 314.
Knowlton vs. Moore, 178 U. S. 41, 49; 44 L. ed. 969, 973.
Curley vs. Tait, 276 Fed. 840, 843.
Vanderbilt vs. Eidman, 146 U. S. 480, 49 L. ed. 963.
Gleason & Otis Inheritance Taxation (3d ed.) 27.
Gaither vs. Miles, 268 Fed. 692.
Safe Deposit & Trust vs. Tait, 295 Fed. 429.
State, etc., Co. vs. Treasurer, etc., 209 Mass. 373, 95 N. E. 851.
Cole vs. Nickle, 43 Nev. 12, 185 Pac. 565.
Reish vs. Commonwealth, 105 Pa. St. 521, 526.
Re Dolan's Estate (Pa.), 124 Atl. 176.

VI.

Trial court erred in overruling plaintiff's motion for an instructed verdict. The trial court erred in not submitting issues of the case to the jury. The Circuit Court of Appeals erred in affirming the judgment of the trial court.

Sub-par. (c), Sec. 401, Revenue Act of 1918 (R. pp. 19, 20).
Opinion of Trial Court (R. pp. 180, 183, inc.).
Shukert vs. Allen, 300 Fed. 754.

SCOPE OF 1918 ACT

Sections 402 and 403 of the Revenue Act of 1918, Fed. Stats. Supp. 1919, pp. 131-132, outline a method of ascertaining the value of the gross estate and the value of the net estate of the taxpayer for the purpose of fixing the amount that is to be used as the basis for collecting estate taxes. Insofar as it relates to the matters here involved, Section 402 provides:

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> * * * * *
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death. * * *"

Following this, there is a provision that any transfer made without consideration within two years prior to the death of the decedent is deemed to be made in contemplation of death.

Under the provisions of subdivision (c), Sec. 402, provision is made to tax two different kinds of trusts:

(a) Trusts that are created in contemplation of death;

(b) Trusts that take effect in possession or enjoyment at or after the death of the founder. These are the only kinds of trust estates that can be taxed. Any trust that is not made in contemplation of death or that takes effect before the death of the founder is not within the scope of this section and, therefore, not subject to taxation.

This section clearly recognizes the right and power of a taxpayer to create a trust. Its purpose is to tax trusts

that are made in contemplation of death, trusts that do not take effect until after the death of the founder.

The Circuit Court of Appeals has extended the scope of this section to cover other trusts in which the beneficiaries do not come into the actual possession of the property before the death of the founder. An application of the doctrine announced by the Circuit Court of Appeals would levy an estate tax on every executed trust which by its terms fixes the termination of the trust at a date subsequent to the death of the founder.

CONSTRUCTION OF STATUTE

The decision turns on the construction and effect of the words "intended to take effect in possession or enjoyment at or after his death," as applied to the instrument executed by the founder on May 5, 1921, a copy of which appears in the Record, pages 11-14. The petitioners claim that under the terms of this instrument the possession and enjoyment of the property involved passed from the founder to the trustee, and the beneficiaries at the time this instrument was executed. The act of the founder and the terms of the trust agreement gave the trustee the legal title and the possession of the property involved; it gave the equitable title to the beneficiaries. Both of these titles passed *in presenti*. The transaction was completed on the 5th of May, 1921. The possession and enjoyment of the property involved in no way depended upon the death of the founder. The interests of the trustee and of the beneficiaries were fixed by the terms of the instrument. The death of the founder in no way changed or affected either the possession of the trustee or the interests of the beneficiaries. When the founder died in September, 1921, there was no change either in the rights, powers or interests of the trustee or the beneficiaries. As the possession of the property changed from the founder to the trustee on the date the instrument was executed, it is clear that no

claim can be made that the possession was to take effect at or after the death of the founder.

The question resolves itself into a consideration of whether or not the founder intended the enjoyment of the property to take effect at or after his death. This intention must be gathered from a consideration of the law relating to trusts, as applied to the conduct of the founder. By his act the founder made an executed trust.

LAW OF EXECUTED TRUSTS

The question presented involves a correct understanding and application of the law relating to trusts. The document executed by Shukert and accepted by the Trust Company is the ordinary form (see R. p. 28) used in making an executed trust. It conveys absolutely and unconditionally all interest that the founder had in the property described therein to the trustee for the benefit of his three children. No reservations were made by the founder. As soon as he executed this instrument and delivered the property described therein to the trustee, the possession and enjoyment of all of the property involved passed from the founder forever. Under the terms of this instrument, there is no doubt nor room for dispute regarding the purpose of the founder or the effect of his act. He parted with the ownership, possession and title to the property involved.

Pomeroy's Equity, Vol. II, 2nd ed., par. 1001, defines an executed trust, as follows:

> "A trust is executed when no act is necessary to be done to give effect to it, when the trust is fully and finally declared in the instrument creating it. A conveyance of land to A in trust for B, a devise of land to A in trust to receive the rents and profits and apply them to the use of B, are examples. It is plain that all ordinary express, passive or active trusts are thus executed."

This same author in discussing voluntary trusts says in paragraph 996:

"When will trusts, and transactions in the nature of trusts, which are purely voluntary, virtual gifts be treated as binding and enforcible in equity? The answer, it will seem, turns upon the distinction between trusts which are executed—that is, completely created or declared—and those which are merely executory, incomplete—that is, promises to create a trust."

Again in paragraph 997 this same author says:

"In order to render the voluntary trust valid and effectual, the party creating it, either by direct transfer or by declaration, must have done everything which, according to the nature of the property comprised in it, was necessary to be done in order to transfer the property and render the transaction binding upon him. A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes:

"1. He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust;

"2. He may make a transfer to a third person upon trust declared in favor of the donee;

"3. He may retain the title and declare himself a trustee for the donee and thus clothe the donee with the beneficial estate. * * *

"If the donee adopts the second or third mode * * * he must employ language which shows unequivocally an intention on his part to create a trust in the third person or to declare a trust in himself. * * * These conclusions are sustained by the decided weight of authority and must be regarded as the settled rules of equity jurisprudence upon the subject."

And, continuing in paragraph 998, this author says:

"If the donor makes a complete conveyance of real property or assignment of personal property sufficient to vest the legal title in the donee; or if he completely conveys or assigns the property to the trustee upon trust effectually created on behalf of the donee; or if he retains the legal title but effectually declares himself a trustee for the donee, thus clothing the donee with all of the beneficial estate—then, in each of these instances, the gift is valid although voluntary; the donee's rights are perfect and equity will enforce them against the donor and all persons claiming under him as volunteers."

In *Bath Savings vs. Hathorn,* 88 Me. 132, 32 L.R.A. 377, the Court said:

"A voluntary trust is an equitable gift, and, like a legal gift *inter vivos,* must be complete. A declaration of trust as effectually passes the equitable title of the fund to the *cestui* as a gift *inter vivos* passes the legal title to the donee. The distinction between them is of a technical nature. In a trust the real title vests in the donee, but the legal title, perhaps, carrying control of the property, may be placed elsewhere; while in a gift both the real and legal title instantly fall to the donee. It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if, perchance, he so does it as to transfer the real or equitable title to the *cestui;* for then he creates an estate really no longer his own. He may retain the legal title, giving him the control, but for the benefit of the *cestui,* according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts. They are the children of equity. They spring from it, and cannot survive without its aid and control. The trustee is merely an agent to administer them, and nothing more."

Iness vs. Potter, 130 Minn. 320, 153 N. W. 604. See note in 3 L.R.A. 902.
Allen vs. Hedrick, 206 Pa. 733, 740.

In *Lewis vs. Curnutt*, 106 N. W. 914, the Court said on page 918:

> "It needs no argument to support the proposition that the owner of land may sever the fee into a life estate and a remainder, and that he may reserve the former to himself and sell or give the latter to whomsoever he will. When he has done so, can it be said that the grantee of the remainder acquires no present interest in the land simply because he cannot come into possession and enjoyment of the property until after the grantor's death? We think no lawyer will answer this inquiry in the affirmative. And yet such would be the necessary result if the contention of the appellee here be correct. Mrs. Crockett conveyed the property by an unconditional deed, and by an accompanying instrument provided that the trustee should not come into possession or control until after her death. The legal effect of this was to create a life estate in her and a remainder in the trustee for the benefit of a *cestuis que* trust. Moreover, it must be remembered that it is not necessary in any case to the establishment of a trust that any beneficial interest shall pass to the trustee. From its very nature a trust involves the idea of a separation of the beneficial interest from the legal title. When a trust is executed by the delivery of a simple conveyance to the trustee, that act and instrument serve to pass an immediate present interest to the *cestui que* trust, no matter how far in the future the enjoyment of the benefit thus provided may be deferred."

In *Podhajsky's Estate*, 115 N. W. 590, the Supreme Court of Iowa said on page 592:

> "It will not be disputed that it is entirely competent for a person, either by a duly acknowledged written instrument or even by parol, to turn over personal property, moneys, securities, or choses in action into the hands of another, to be held and used for the benefit of some designated beneficiary, and that, when this is done, such beneficiary obtains an immediate and vested interest in the subject of the trust, which the

trustor cannot revoke or disaffirm unless such power of revocation has been reserved in express terms at the time the trust was created. Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; Nichols v. Emry, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; Ewing v. Buckner, 76 Iowa 467, 41 N. W. 164; Millspaugh v. Putman, 16 Abb. Prac. (N. Y.) 380."

In further discussing this question the Court said on page 593:

"In Haxton v. McClaren, 132 Ind. 235, 31 N. E. 48, a father delivered notes to his son in trust to be collected, and the proceeds to be paid in part to certain children and grandchildren, with the provision that whatever balance of the money so collected should remain in the hands of the son after the death of the donor should be equally divided between two named persons. Upon this state of facts the Supreme Court of Indiana held that the transaction was such a trust and completed gift that the notes were no longer a part of the father's estate, and were not affected by the will thereafter executed by him making a different disposition thereof. Many other authorities to the same general effect could be cited. We regard it as a settled question that, except as regulated or restricted by statute, a person having property or property rights of any kind, whether legal or equitable, may give the same in his lifetime either directly to the donee or by any suitable declaration to a third person for the use of the donee, authorizing such person to make delivery of the subject of the gift after the donor's death."

When the founder parted with the possession and enjoyment of the property involved, this possession and enjoyment passed to some one else. Neither the possession nor the einjoyment of the property was in the founder at the date of his death. As this property was not a part of his estate, it cannot be included for the purpose of ascertaining the value of the founder's estate. When the founder created this trust estate the title to the property passed to and vested in the beneficiaries and the trustee.

Under the terms of the instrument executed by the founder, there was no suspension of the equitable title. If the equitable title was suspended in whom did it vest? It was not in the founder. It had passed from the founder. The trust instrument designates the three children of the founder as the beneficiaries. It is entirely plain that no one else has any beneficial interest in the estate. Other provisions in the instrument provide who shall inherit the property in the event the beneficiaries die. That did not prevent the equitable title from vesting in these beneficiaries on the date the trust was created.

Under the doctrine announced in *Shelton vs. King,* 229 U. S. 90, the founder had the power to create a trust estate and place limitations on the use of the property given to the beneficiaries. The fact that the founder in this instrument made provision for the distribution of the property in the event any of the beneficiaries should die before the end of the trust period, did not prevent the vesting of the equitable interest in the beneficiaries at the time the trust instrument was made.

The founder could not make an unconditional conveyance of his property and at the same time suspend the passing of the legal and equitable title to the persons to whom he made the conveyance. He could, subject to the law against perpetuities, suspend the alienation of the property. In creating the trust he did not attempt to suspend either the passage of the legal or equitable title, nor did he place any unlawful restraint on the right to alienate the property. His act vested the title to the property in the persons to whom it was conveyed.

TRUST INSTRUMENT PASSED IMMEDIATE ENJOYMENT TO BENEFICIARIES

One of the definitions of "enjoy" given by Webster is "to have the benefit of." As soon as this trust was created, the only persons who had any interest in it were the

trustee and the beneficiaries. The trustee had possession, the beneficiaries had the benefits. True, the complete possession of the property did not pass to the beneficiaries until thirty years after the instrument was executed. The delayed possession did not deprive the beneficiaries of the enjoyment of the property. All earnings of the trust funds were to be held for the benefit and use of the beneficiaries.

The beneficiaries began to enjoy the benefits of the trust as soon as it was created. They will continue to enjoy these benefits. They became and are now the owners of the principal and all accumulations. The trustee is in possession of the property but holds it in trust for the benefit and use of the beneficiaries.

> "The word 'enjoy' means to have, possess, and use with satisfaction; to occupy *or have the benefit of.*" Board of Trustees v. Dimmitt, 87 S. W. 536, 113 Mo. App. 41.

The Revenue Act of June 13, 1898, Chap. 448, U. S. Comp. St. 1901, pp. 2307, 2308, imposed legacy taxes on property "transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor."

This provision was construed in *Ward vs. Sage,* 185 Fed. 7; *Title Guarantee vs. Ward,* 164 Fed. 459, 184 Fed. 449.

ESTATE CONVEYED IS VESTED, NOT CONTINGENT

The Circuit Court of Appeals attempts to treat the estate conveyed to the beneficiaries as a contingent estate. There is nothing in the trust instrument that warrants this construction. The estate of the beneficiaries is a vested estate. *It gave an immediate right to the present enjoyment of the estate.*

In re McClelland's Estate, 70 Atl. 737, 221 Pac. 261, the Court said:

> "To vest an estate is to give a legal or equitable *seisin.* An estate 'vests' in a person who is given a

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present and immediate interest, as distinguished from an interest the existence of which depends on a contingency. The word applies to estates in personalty, as well as estates in land."

In *Rhode Island Hospital vs. Noyes*, 26 R. I. 323, 58 Atl. 999, the Court said on page 1002:

"In determining whether an estate is 'vested' or contingent, 'the question is always: Is futurity annexed to the substance of the gift? If so, the vesting is postponed. Or is it annexed to the time of payment only? If so, the legacy vests immediately.' Another authority says: 'The question of "vested" or contingent is not to be tested by the certainty or uncertainty of obtaining the actual enjoyment, for that would make the character of the estate depend, not upon the terms of its creation, but on the form of the result. Neither does it depend on the defeasibility or the indefeasibility of the right of possession, for many estates are vested without possession, as well as with, which are yet defeasible. If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate.'"

In re Long's Estate, 228 Pa. 594, 77 Atl. 924, the Court said on page 928:

"If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate; an unpossessed estate being vested if it is certain to take effect in possession by enduring longer than the precedent estate. A will gave the residue of tetstator's estate to a trustee for 20 years, with power to invest and reinvest it, and provided that, when there should be a greater accumulation than the trustee deemed necessary for the purposes of the trust, he should divide it into six equal shares, paying one share to each of testator's five children and dividing one share among the children of testator's deceased son, and provided that, if any of testator's children

should die without leaving lineal descendants before expiration of 20 years after testator's death, their shares should go to the other legatees, share and share alike, per stirpes and not per capita, and that at the expiration of 20 years the trustee should sell the property and divide it into six shares to be distributed as provided for distribution of the income. *Held,* that all legacies under the will were vested subject as to the children to be divested by death within 20 years without leaving lineal descendants. The legacies to the children of testator's deceased son were vested absolutely and unconditionally, so that an administrator of a deceased daughter of testator's deceased son was entitled to share in a distribution of income."

8 Words & Phrases, 1st ed., 7302.
4 Words & Phrases, 2nd ed., 1157.

In *Lines vs. Lines,* 142 Pa. St. 149, 24 Am. St. Rep. 407, claim was made by the wife that certain property conveyed in trust by her deceased husband was a part of his estate at the time of his death. The husband had executed a deed of trust to the Union Trust Company and made it a trustee for certain beneficiaries named in the deed. In discussing this question, the Court said:

"When we come to examine the deed to William E. Lines, we find an absolute conveyance to him of certain securities specified therein upon the following trusts:

"'To have and to hold all of said shares of stock unto the said William E. Lines, his executors, administrators, and assigns, upon the following trusts, to-wit, in trust, to divide the same into twenty-eight equal shares, of which he shall hold fourteen shares for the use of my putative son, the said William E. Lines, and of the remaining fourteen shares he shall hold ten, to-wit, one each for the use of the ten children of my deceased sister, Mary Fairchild, named respectively * * * and the remaining four shares he shall hold for the use of my brother, John Lines. During my life the said William E. Lines shall pay over to me and for my use, at the times he may receive the same, all the dividends or other income which he may receive upon and from

all of the above described stocks, and he may deliver the shares thereof above mentioned unto the several beneficiaries above named, at such time or times as he, in his unfettered discretion, shall think fit. And should he, in the exercise of his discretion, determine to hold the same during my life and thereafter, he may, after my death, pay the income thereof to the said beneficiaries respectively, and in their several proportions, until such times as he may see fit to transfer the principal of the said shares to the persons entitled thereto respectively,' etc.

"It is idle to call this a testamentary paper. It passed his entire legal title to the trustee, with a *present interest.* He parted with the property wholly and entirely. Even the reservation of the income to himself for life was optional with the trustee. The latter could have distributed the corpus of the estate to the beneficiaries the next day. The power of revocation reserved in the deed, having never been exercised, was precisely as if it had never existed. A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected, as though there had never been a reserved right of revocation; Dickerson's Appeal, 115 Pa. St. 198, 2 Am. St. Rep. 547; Stone v. Hackett, 12 Gray 227. *There is nothing in this deed to indicate an intention to create a trust to take effect only after the death of the donor. On the contrary, the intent is clear to create a present trust in favor of the beneficiaries named therein, to take effect immediately with the execution of the deed.* The securities passed into the hands of the trustee along with the trust deed. The transaction was complete, and the donor was absolutely denuded of his property. It is useless to pursue the subject further. The appellant had no case, and her bill was properly dismissed."

In the late case of *Coolidge vs. Nichols,* 4 Fed. (2nd) 112, the District Court of Massachusetts construed the provisions of Section 402 of the Revenue Act of 1918 and con-

strued the provision "intended to take effect in possession or enjoyment at or after the death." The court held that where a mother two years before her death conveyed real estate by warranty deed to her two sons, who at the same time executed leases for one year for a nominal rental with a right to renew leases from year to year, subject to the right of either party to terminate them at the end of a year, by written notice, the effect was to vest complete title and right of possession in the grantees, not dependent in any way upon the death of the grantor, and that the grantees had no interest therein subject to tax under Section 402, Revenue Act of 1918.

The Court also considered and construed a trust agreement made by the mother and her husband, whereby property was conveyed to her sons, the income from which was to be paid to the donors during their life. Later by a separate instrument, the donors assigned all their interest to the sons with directions to the trustees to pay the income to said sons. The Court held that as to the principal of the fund, the arrangement was intended to take effect in possession or enjoyment at or after the death of the donors and that the said property should be included for taxation under the provisions of Section 402 of the Act of 1918.

This case discussed at length some of the questions involved in the case at bar. An application of the doctrine announced by the Court to the facts in the case at bar would warrant a reversal.

MEANING OF THE ACT

The tax in controversy is an "estate tax" imposed under the alleged authority of the Revenue Act of 1918. With reference to an estate tax, the Act declares in Section 401:

> "A tax * * * is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act."

The language is plain. The word "transfer" means to pass, transmit. The word "estate" in its broadest sense, means property. The plain meaning of the language used is to place a tax upon the right or privilege to transfer, pass or transmit property, by reason of the death of the owner. Necessarily, there must be an estate—property—to be transferred or passed by reason of the death of the decedent, or there can be no tax. It follows that the property taxed must in some way be a part of the estate at the date of the death of the decedent.

The aim of the act is to collect taxes on the interest which ceased by reason of the death of the taxpayer. This Court has uniformly construed the act in conformity with its declared purpose. Many cases could be cited, the following are sufficient:

Y. M. C. A. vs. Davis, 264, U. S. 47, 68 L. ed. 337.
Edwaras vs. Slocum, 264 U. S. 61, 68 L. ed. 313, 314.

It necessarily follows from such definition, first, that that the Act imposes a tax only on the transfer of such property interest as ceased at and on the death of the decedent, and, second, that property transferred by the decedent in his lifetime and in and to which he reserved neither legal nor equitable title or interest, is not a part of his taxable estate, for that, no interest in such property ceased at and by reason of his death.

As this Court has defined estate tax imposed by the Act of 1918 as tax not upon "the interest to which legatees and devisees succeed on death," but a "tax "upon the interest which ceased" by reason of the decedent's death, such definition is a guide to the meaning of the other provisions of the Act and controls and limits such meaning.

This definition is basic and fundamental. The thing taxed is the interest in property which ceased by reason of decedent's death and on account of such death is trans-

ferred by law or testament to another. Hence, in construing the various provisions of the Act, each provision, phrase and word refers back to this basic and fundamental definition and must be construed with reference thereto. It can not be assumed that any provision of the Act authorizes the imposition of a tax other than a tax "upon the interest which ceases by reason of decedent's death."

The estate tax imposed by the Act of 1918 is not a tax on legacies or inheritances. It is not a tax on the right or privilege of receiving or inheriting property. It is a tax on the estate, in the nature of a death duty; it is a tax on the right or privilege to transfer or transmit property from the dead to the living.

The distinction is a practical one. In *Knowlton vs. Moore,* 178 U. S. 41, 49; 44 L. ed. 969, 973, the Court quoted the following from *Hanson, Death Duties,* page 63:

> "What it (referring to the British Statute) taxes is not the interest to which some person succeeds on a death, but the interest which ceases by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the Act to revert to principles of succession duty which have no real connection with the subject."

In *Curley vs. Tait,* 276 Fed. 840, 843, the Court spoke of this distinction as follows:

> "The distinction is not pedantic, not technical, but * * * is in the highest degree practical."

True, in either case there must be an estate—property—to be transferred from the dead hand to the living hand. In the case of a succession tax, it is not imposed until the property is, in fact, received. The right to receive may be subject to contingencies that may or may not happen. In such case the contingent right to receive is not taxable because the heir or devisee has not received the

property. *Vanderbilt vs. Eidman,* 146 U. S. 480, 49 L. ed. 963.

In the case of an estate tax—that is, a tax on the right to transfer or transmit property from the dead to the living—the tax is imposed when and as the transfer takes place, which transfer always occurs at the time of the death of the decedent. That is to say, on the death of the decedent his property passed *eo instanti* under the law or by tetstament to others. It is such transfer that is taxed by the Revenue Act of 1918.

Further, it must be kept in mind that death of the donor is the generating source from which the tax power takes its being. *Knowlton vs. Moore,* 178 U. S. 41, 44 L. ed. 969, was an action which arose under the Revenue Act of 1898, which imposed a tax on legacies and inheritances; in other words, a tax on the right to receive property. In that case the Court reviewed and restated the law if inheritance taxes or death duties. On page 55, after reviewing the law from ancient to modern times and stating that although such taxes or duties were assessed in different ways and under different names, it announced the following rule:

> "* * * nevertheless, tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular tax power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which said taxes are more immediately rested."

And further, on page 78, the Court, in speaking of said taxes, said:

> "* * * Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied upon the occasion of death would be computed."

In *Gleason and Otis, Inheritance Taxation* (3d ed.) 27, the rule is stated as follows:

> "It is not a transfer between the living that is taxed, but a transfer from the dead hand to the living hand; and, therefore, it is the doctrine * * * that the transfer which is the subject of the tax, takes place at death."

The Revenue Act of 1918 does not tax gifts, unless made in contemplation of death. Here it may be said that a gift made in contemplation of death is necessarily testamentary in character and the property so transferred is taxable as passing at the death of the decedent. The law looking through form to substance taxes the property so transferred. But that is not this case.

Gaither vs. Miles, 268 Fed. 692, was a suit to recover estate taxes. The taxes were imposed by the Commissioner on the proceeds of five policies of insurance upon the life of the testator, who about two months before his death had caused them to be made payable to his son and daughter. As to one of the policies he reserved to himself the right to again change the beneficiary; and as to another policy of the endowment class, which had about 19 months longer to run, he provided that if he were living at its maturity the amount becoming due under it should be paid to him. The Court held the proceeds of said two policies taxable, saying:

> "In neither of the above instances was the transfer intended to take effect in possession or enjoyment until the death of the assignor."

The Court held the proceeds of the remaining three policies not taxable. The proceeds of the two were taxable for the reason only that the assignor reserved unto himself certain rights therein.

Curley vs. Tait, 276 Fed. 840, was an action to recover estate taxes. Among the items of the tax was one imposed

on property covered by an ante-nuptial agreement wherein the deceased just prior to his marriage transferred certain property to Johns Hopkins Hospital under an agreement, on the part of the hospital, to pay, after the marriage was solemnized, the net income of the property to the wife, during her life and afterwards to the testator during his life, if he should prove to be the survivor. The defendant imposed the estate tax on the property so transferred because "it says that the hospital was not to enjoy the stock until after his death," but the Court held the property not taxable, saying:

> "Was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the hospital, which covenanted to pay the net income thereof to the prospective wife during her life; Grafflin reserved nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor? If all beneficial ownership irrevocably passes from the transferer at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another. * * * It follows that all that is taxable, if anything, is in the language of the statutet, 'the interest which he retained for himself.'"

In *Safe Deposit & Trust Co. vs. Tait*, 295 Fed. 429, a husband and wife in their lifetime conveyed property to a common trustee, on condition that each was to receive the income from the property conveyed by him or her during their life and the remainder was to descend to the surviving spouse. The court held that this trust was subject to tax under Section 402 because it created a trust in contemplation of death.

In *State, etc., Co. vs. Treasurer, etc.*, 209 Mass. 373,

95 N. E. 851, the Court, construing a similar provision in the Massachusetts statute, said:

> "The test, however, by which the exemption is to be ascertained, does not depend upon whether the power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferrer."

Note the language of the Court is "passing of the title," not receipt by the beneficiaries of title, possession or enjoyment.

In *Cole vs. Nickle,* 43 Nev. 12, 185 Pac. 565, the Court, in construing a similar provision of the statute of Nevada, said:

> "The test in determining whether, under a deed, grant or gift, the property was not intended to vest in possession or enjoyment until after the death of the grantor, does not depend upon whether a power to revoke has or has not been inserted, but on whether or not the property passes with all the attributes of ownership, independently of the death of the transferrer."

Reish vs. Commonwealth, 106 Pa. St. 521, 526, was an action wherein the Court construed a similar provision of the statute of Pennsylvania. The facts were: Reish had made an absolute deed of land and took back from his grantee a bond to pay him the income of the land during his life. The Court held the transfer of property so conveyed taxable, saying:

> "It is true, the obligation of the bond was not inserted as a condition or reservation in the deed; it was in form a mere personal obligation; but this contention does not involve a technical question of title, nor a lien; the whole matter depends upon the single fact whether or not the transfer was made or intended to take effect in enjoyment at the death of the grantor. The policy of the law will not permit the owner of an estate to

defeat the plain provisions of the Collateral Inheritance Law by any device which secures for him, for life, the income, profits, and enjoyment thereof; it must be by such a conveyance as parts with the possession, the title, and the enjoyment in the grantor's lifetime."

In *Re Dolan's Estate* (Pa.), 124 Atl. 176, a decedent transferred certain property in trust for the period of twenty-one years from and immediately after the death of her last surviving lineal descendent living at the time of her death. The income was to be paid to her three children during their lives and at the termination of the trust, the corpus of the trust property was to be divided among the issue of her three children. The trustee was given full power to grant, sell and convey the trust estate for such price and upon such terms as it deemed best, and the grantor reserved to herself the power to change the trustee and also the power to revoke the trust.

The Court held the transfer not taxable and, after quoting the provision of the statute imposing the tax upon transfers of property, as follows: "When a transfer * * * by deed, grant, bargain, sale or gift * * * intended to take effect in possession or enjoyment at or after death," said:

"To escape the latter provision, a conveyance must be such as parts with possession, title and enjoyment in the grantor's lifetime.

INTENTION OF FOUNDER

At the time this trust was created, the founder possessed an estate worth more than one million dollars. The creation of this trust was not intended by him to be a testamentary disposition of any part of his estate. He was 56 years of age and in his normal state of health. He died on September 29th, 1921—four months and twenty-four days after the trust was created. Two days before his death he made a will (Exhibit 2, R. p. 68) by which he disposed of all the estate that he then owned. The value of

this estate as shown by the return of the executrices was $801,095.68, and the departmentt ascertained that the net taxable estate for $673,691.89, and under the provisions of the Act of 1918 levied taxes against it of $26,921.50. The validity of this tax is not questioned.

The founder intended to make a present of this trust property to his children. He had the lawful right to do this. A gift was not taxable under the laws that existed at the time. The Revenue Act of 1924, Title III, par. 2, imposes a tax upon gifts. This is a legislative recognition that the Act of 1918 did not tax them.

JUDGMENT IS ERRONEOUS

The trial court erred in sustaining defendants' motion for an instructed verdict. The Court of Appeals erred in sustaining the judgment of the trial court. At the conclusion of the testimony, the petitioners moved the trial court (R. 175) to instruct the jury to return a verdict in favor of the plaintiffs (petitioners) and against the defendants. Such motion would lie if, under the evidence, the transfer in question was "not made in contemplation of death" nor "not intended to take effect in possession or enjoyment at or after death." To sustain this motion it was necessary for the trial court to find both of these facts in favor of the petitioners. The trial court overruled petitioners' motion; sustained the motion of the defendant for an instructed verdict on the ground that the trust created was intended to take effect at or after the death of the founder.

The founder having died within two years after the trust was created, there is a presumption that it was made in contemplation of death. This was a question of fact that should have been submitted to the jury. The trial court held (R. 174) that it was not necessary to pass on this question for the reason that on its construction of the law, the trust was not intended to take effect in possession or enjoyment until after the death of the donor,. If the trial

court was in error in this, the motion of the petitioners should either have been sustained and the jury instructed to return a verdict in their favor, or the issue as to whether or not the trust was created in contemplation of deatah should have been submitted to the jury. In this the trial court erred. The Circuit Court of Appeals in affirming the judgment of the trial court erred.

Upon the foregoing considerations and those assigned in the petition, a Writ of Certiorari should be granted herein.

Respectfully submitted,

ARTHUR F. MULLEN,
Counsel for Petitioners.

Dated this 23rd day of July, 1925.

Office Supreme Court
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 193

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTORS OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEBRASKA,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 193.

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEBRASKA,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONERS.

JURISDICTION OF THIS COURT.

This is a suit brought by petitioners, executrices of the estate of Gustave E. Shukert, deceased, plaintiffs, in the United States District Court for the District of Nebraska, Omaha Division, against the respondent to recover a federal estate tax paid under protest after a claim for refund thereof had been denied by the Commissioner of Internal Revenue.

The tax was levied under Section 401 of the Revenue Act of 1918, enacted February 24, 1919 (40 Stat. 1057, 1096, c. 18, § 401).

Judgment was rendered against the petitioners by the District Court on May 24, 1924. (Rec., 14.)

The case is reported as *Shukert* v. *Allen*, 300 Fed. 754.

On a writ of error the judgment of the District Court was affirmed by the Circuit Court of Appeals for the Eighth Circuit on May 15, 1925. (Rec., 126.)

The opinion of the Circuit Court of Appeals is reported as *Shukert* v. *Allen*, 6 Fed. (2d) 551.

The case is before this court on a writ of certiorari granted by this court on October 19, 1925 (Rec., 127), pursuant to Section 240 of the Judicial Code as amended.

Statement of the Case.

There is presented to the court for decision in this case the question whether property which has been transferred absolutely by a decedent in his lifetime, and not in contemplation of death, and in which he has reserved no interest, should be included in his gross estate in determining the value of his estate for the purpose of the levy thereon of an estate tax under Title IV of the Revenue Act of 1918.

Gustave A. Shukert was a resident of Omaha, Nebraska. On May 5, 1921, he transferred to the United States Trust Company of Omaha, as trustee, by a deed of trust of that date, personal property consisting of notes which matured at intervals ending February 1, 1951, secured by first mortgage on real estate and Liberty Bonds, all of a nominal value of $225,000, but found to have an actual value of $190,157.55, at the time of Shukert's death. (Rec., 21.)

We attach to this brief as Appendix I a copy of the deed of trust as it appears in the record. (Rec., 9.)

The beneficiaries of the trust named in the deed were his three children, Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert. The trust was voluntary and without money consideration. Shukert, however, by the deed parted with all his title and interest in the trust property and reserved no interest therein of any kind whatsoever. He reserved no power of revocation or amendment and no right of control over the trust estate.

The deed of trust became effective as an executed trust at the time of its delivery on May 5, 1921. Thereupon the rights of the beneficiaries under the deed became fixed.

The trust deed provided that the Trustee should invest and reinvest, manage and control the trust property; that it should accumulate the income in order to increase the principal of the fund, except that small payments not to exceed $250 per month in any month might be made to his wife (who was not otherwise a beneficiary of the trust) or to any beneficiary, in case of extreme destitution and lack of the necessities of life.

The deed of trust then provided as follows:

"This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above named children of the Founder shall

die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issue shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above named beneficiaries shall die without issue before the termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita."

It will be noted that the date fixed for the termination of the trust coincided with the date of maturity of the last maturing note transferred by the deed of trust.

The deed of trust contained further provisions relating to the duties of the trustee as to investments, the right of the founder to add additional property to the trust estate, the right of compensation to the trustee for services, in a sum equal to three per cent of the income of the trust estate, and the making of annual reports to the wife of the founder and to each of the beneficiaries under the trust deed.

It will be observed that the entire income of the trust estate, less the compensation of the trustee, and possible payments to the wife and beneficiaries for the bare necessities of life, was to be accumulated until the termination of the trust. The trust was to terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries named in the deed of trust should have occurred more than twenty-one years prior to February 1, 1951, in which case the trust

was to terminate twenty-one years after the death of said survivor.

At the termination of the trust the principal and undistributed income were to be paid to and divided among the named beneficiaries.

Shukert was fifty-six years of age on March 22, 1921. (Rec., 65.)

At the time of the execution of the trust his daughter Flora was twenty-one years of age, his son Gustave was fifteen years of age, and his daughter Isabel, the oldest child, was more than twenty-one years of age. (Rec., 61.)

He died on September 29, 1921. (Rec., 35.)

He executed his will on September 27, 1921. (Rec., 53.) A copy of the will appears at Rec. 55.

After his death the executrices of his estate filed a return for federal estate tax, showing a total tax due of $26,921.51. (Rec., 98.) This tax was duly paid.

Subsequently on a review and audit of the return the Commissioner of Internal Revenue assessed an additional tax against the estate of $13,685.97. (Rec., 99.)

This additional tax resulted from including as part of the gross estate the properties which had been transferred by the deed of May 5, 1921.

The additional tax was paid under protest on June 28, 1923. (Rec., 13.)

A claim for refund was filed on July 3, 1923, and was denied by the Commissioner of Internal Revenue on November 23, 1923. (Rec., 6, 13.) The Commissioner denied the claim for refund on the ground that the trust of May 5, 1921, had been created by Shukert in contemplation of death. (Rec., 7, 8, 13.)

This suit to recover the tax was filed February 26, 1924. (Rec., 1.)

The case was tried in the District Court on the theory that it involved the taxation of a gift made in contemplation of death.

At the conclusion of the testimony counsel for plaintiffs moved the court to instruct the jury to return a verdict for the plaintiffs (Rec., 112), and the defendant's counsel moved the court to instruct the jury to return a verdict for the defendant "on the ground that the undisputed evidence shows a trust agreement created by Gustave E. Shukert in his lifetime which was intended to take effect in possession and enjoyment after his death." (Rec., 112.)

Thereupon after argument upon these motions counsel for plaintiffs offered instructions on the law relating to the taxability of gifts made in contemplation of death. (Rec., 113-114.) Defendant's counsel offered instructions on the same matter. (Rec., 114-117.)

The court refused to give any of the instructions asked relating to gifts in contemplation of death and at the request of the defendant instructed the jury as follows:

> "You are instructed that under the undisputed evidence the trust created by Gustave E. Shukert in his lifetime was intended to take effect in possession or enjoyment at or after his death and that your verdict should be for the defendant." (Rec., 114, 119.)

The contention of petitioners is that the deed of trust of May 5, 1921, was an absolute and immediate transfer made by Shukert in his lifetime of all interest in the property transferred thereby; that at the time of his death he had no interest therein of any kind; that no interest in said

property passed from him at his death; that the deed was an executed transfer *inter vivos* not in contemplation of death; that therefore the transfer was not within the provision of Section 401 of the Revenue Act of 1918 which imposes a tax upon the transfer of the net estate of a decedent or within Section 402 (c) relating to transfers taking effect at or after death; and that as a result the value of the property transferred should not have been included in fixing the value of his estate for the purpose of the federal estate tax.

Specification of Errors.

The question presented in this case and the errors relied upon by petitioners as set up in the petition for the writ of certiorari and brief in support thereof are:

1. The lower courts erred in holding that the trust created by Shukert of the property described therein was a trust intended to take effect in possession or enjoyment at or after his death within the meaning of Section 401 and Section 402 (c) of the Revenue Act of 1918 and that the value of the trust property should have been included in the value of the gross estate of Shukert after his death for the purpose of determining the estate tax payable under said act.

2. The trial court erred in sustaining respondent's motion for a directed verdict and the Circuit Court of Appeals erred in affirming the judgment of the trial court.

3. The trial court, having erred in instructing the jury to find for the respondent, erred further in refusing to submit to the jury the issue as to whether or not said trust was created by Shukert in contemplation of death.

SUMMARY OF ARGUMENT.

I.

(a)

The trust transfer involved in this case was an absolute transfer by the decedent in his lifetime of all his right, title and interest in and to the trust property both principal and income.

He retained no title or interest which he could pass or transmit at his death.

Sec. 401 of the Revenue Act of 1918 imposes an excise tax upon transfers at death.

It imposes no other tax.

Since nothing passed from the decedent at his death under the trust transfer, the transfer is not taxed by the statute.

(b)

Sec. 402 (c) of the statute provides that there shall be included in a decedent's estate the value of property of which he has made a transfer or trust in contemplation of or intended to take effect in possession or enjoyment at or after death.

This section of the statute does not impose a tax.

It should not be so construed as to enlarge the transfers which are taxed by Sec. 401, viz.: transfers at death.

Transfers in contemplation of death and transfers of property, possession or enjoyment of the principal or income of which is retained by the transferror, become

effective at death and are transfers at death which are taxed by Sec. 401.

But transfers made by a decedent in his lifetime under which he retains no title or interest to pass at his death are not transfers at death and are not taxed by Sec. 401.

Sec. 402 (c) should not be construed to include such transfers unless the language used admits of no other construction.

The language used clearly admits of the construction that the transfers defined by the section are transfers of property retained by the transferror, either as to principal or income, in his own possession and enjoyment until his death.

Such transfers are transfers at death and are taxed by Sec. 401.

This construction of Sec. 402 (c) eliminates all conflict between Sec. 401 and Sec. 402 (c) and all constitutional questions and should be adopted.

II.

Shukert by his deed of trust of May 5, 1921, transferred the possession of the trust property to a trustee for his children. They enjoyed substantial interests in the property from the date of its delivery. They had vested interests in the trust property. The trust income began to accumulate at once for their benefit. The acquired the right to sell and transfer their interests.

The trust transfer took effect in possession and enjoyment in the children upon its delivery within the meaning of Sec. 402 (c).

III.

The judgments of the District Court and of the Circuit Court of Appeals are erroneous and should be reversed.

The case should be remanded for a new trial.

ARGUMENT.

(a)

The Revenue Act of 1918 was in force at the time of Shukert's death and controls the taxation of his estate.

The relevant provisions of the Act are as follows:

"SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1918, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) *is hereby imposed upon the transfer of the net estate of every decedent dying* after the passage of this Act, whether a resident or nonresident of the United States: (Italics ours)

* * * * *

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time *made a transfer or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death* (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (Italics ours.)

* * * * *

> "SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—" (certain deductions named in (1) to (4).)

These sections are part of Title IV of the Revenue Act, entitled "Estate Tax."

Title IV deals with taxes upon the transfer of decedents' estates.

Taxes on the transfer of decedents' estates are referred to as estate taxes, inheritance taxes, legacy taxes, death duties, etc.

By whatever name called they are excise taxes imposed upon the privilege of transmitting property at death. This privilege is one which is subject to legislative regulation and taxation.

Such taxes may be imposed by the United States.

> *New York Trust Company* v. *Eisner*, 256 U. S. 345.

Brief quotations from *Knowlton* v. *Moore*, 178 U. S. 41, in which this court considered at length the subject of taxation upon decedents' estates, will define the nature of such taxes.

After reviewing the whole field of such taxation this court said:

> "Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that *death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living,* on which such taxes

are more immediately rested." (p. 56.) (Italics ours.)

* * * * *

"Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is *the power to transmit or the transmission or receipt of property by death* which is the subject levied upon by all death duties." (p. 57.) (Italics ours.)

* * * * * *

"It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern *the passing of property by death, for if there was no property to transmit there would be nothing upon which the tax levied on the occasion of death could be computed.*" (p. 78.) (Italics ours.)

In the work of Gleason and Otis on Inheritance Taxes (3rd ed.), p. 27, is found a definition of inheritance taxes which is frequently quoted:

> "It is not a transfer between the living that is taxed, but *a transfer from the dead hand to the living hand;* therefore, it is the doctrine * * * that the transfer which is the subject of the tax takes place at death." (Italics ours.)

As stated above in the *Knowlton* case, inheritance taxes may be levied upon either the transmission or the receipt of property by death.

It is important in this case to bear in mind that this court has construed the Revenue Act of 1918 to impose a tax upon the *transmission* and not upon the *receipt* of property by death.

In the case of *Y. M. C. A.* v. *Davis*, 264 U. S. 47, the residuary legatee under a will claimed that it was a charitable corporation and that its legacy was exempt from tax under the Revenue Act of 1918. This court

held that the tax imposed by the Act was upon the right to transfer at death and not upon the right to receive, and said:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49." (p. 50.)

A similar question was before the court in *Edwards* v. *Slocum*, 264 U. S. 61, and the court in that case said:

> "But this is not a tax upon the residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore*, 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.' It levies a sum equal to a certain percentage of the value of the net estate, and provides the criteria by which the net estate shall be ascertained. It thus manifestly assumes that the net estate will be ascertained before the tax is computed." (pp. 62, 63.)

See, also, *U. S.* v. *Perkins*, 163 U. S. 625.

Coming then to an examination of the provisions of Section 401 of the act in question, we find that it is the only section in Title IV of the act which purports to impose a tax upon the transfer of decedents' estates.

Authority for the imposition of a tax in any case, if such authority exists, must be found in that section. All transfers which are to be subjected to a tax under

Title IV must be brought within the language and intent of Sec. 401.

This section imposes a tax "upon the transfer of the net estate of every decedent dying after the passage of this act."

While the section does not state in words that the tax is imposed upon a transfer *at death*, the language used admits of no other reasonable construction.

The use of the words "net estate" of the "decedent dying" clearly refers to the property which a man possesses at the time of his death. A tax upon the transfer of such property must of necessity be imposed at death. It cannot be successfully contended that the transfers referred to in the section are transfers "at any time," or that this language is broad enough to include transfers by the decedent in his lifetime.

It was clearly the purpose of Congress by this section to impose an excise tax upon the privilege of *transferring property at death.* If there is no transfer of property by decedent at his death, no tax is imposed.

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner." *Davis case,* 264 U. S. 47-50.

In the case at bar Shukert at the time of his death had no title or interest in the property described in the deed of trust which he could transmit. He had parted in his lifetime with every vestige of title, interest and control in and over the property.

He had at death no right or privilege of transmitting the trust property upon which the statute could operate.

Our contention therefore is that the statute imposes no tax in this case.

(b)

The District Court and the Circuit Court of Appeals held however that the statute imposed a tax upon his transfer of the property in his lifetime, because the transfer was made to take effect in possession or enjoyment after his death and therefore came within the provisions of Sec. 402 (c) quoted above.

Paragraphs (a) to (f) of Sec. 402 relate to property which shall be included in determining the value of the estate the transfer of which is taxed by Sec. 401. They do not purport to assess a tax; they define the estate upon the transfer of which a tax has been previously imposed by the act.

We submit that it was not the purpose of Congress by these paragraphs to broaden the scope of Sec. 401 to include transfers of property which were not taxed under Sec. 401. It was not the purpose of Congress by these paragraphs to provide for the imposing of excise taxes upon any other privilege than the privilege of transmitting property at death and these provisions should be so construed that their application is limited to the transfer of property passing at death.

Our contention is illustrated by the case of *Blount* v. *U. S.* 59 Court of Claims 328. In that case the value of an estate held by a husband and wife by the entirety was included as part of the husband's estate pursuant to paragraph (d) of Sec. 402, which provides for the inclusion in the net estate of the value of interests held in the entirety. The court held that nothing passed from the husband at his death; that the estate continued in the wife; that as nothing passed from the husband at his death no tax was imposed by Sec. 401, and that paragraph (d) should not be construed to include an interest which did not pass at death.

The same conclusion was reached by the Board of Tax Appeals in the case of *Root* v. *Commissioner,* Decision 1954, 1926 Commerce Clearing House, 3655, and in the case of *Dyer* v. *Commissioner,* Decision 1951, 1926 Commerce Clearing House, 3649, both decided on November 30, 1926. Both of these cases involved the taxation of estates by the entirety.

We contend that the conclusion reached in the cases just cited is sound and that Sec. 402, which merely defines the estate, the transfer of which is taxed by Sec. 401 should not be so construed as to include transfers not made at death and not taxed by Sec. 401.

In the case at bar the Circuit Court of Appeals held that although Stuckert had parted with all interest in the property, yet inasmuch as the beneficial interest in the property conveyed was not intended to vest in possession in the beneficiaries until after Shukert's death, the value of the property transferred was properly included in his estate under Sec. 402 (c).

In commenting upon the Shukert Case, 6 Fed. (2d) the Judge of the District Court of Massachusetts, in *Bradley* v. *Nichols,* 13 Fed. (2nd) 857, said:

> "To say that property which has been completely given away and upon the disposition of which the donor's death has no effect is still part of the donor's estate is to say something which is simply not true." (p. 859.)

What, then, is the proper construction of Sec. 402 (c) which provides for including in the value of the estate of a decedent the value at his death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has at any time created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death"?

The Court of Appeals in its opinion drew a distinction between a transfer and a trust. But, in construing a statute which purports to tax transfers at death, it seems to us immaterial whether the transfer is by trust or otherwise.

The corresponding section of the Revenue Act of 1926 (Stat. 1925, 1926, part 1, page 70, Sec. 302 (c)) uses the words "a transfer by trust or otherwise." This, we contend, is the meaning of the words used in Sec. 402 (c) which we are now considering. The term transfer is broad enough to include a transfer in trust and in this argument we use the term in its broadest meaning.

It is our contention that it was the purpose of Congress by these provisions to include property the possession or enjoyment of which the decedent had retained up to the time of his death, so that the property in reality passed *from him at his death*, although it had been previously in form transferred.

In construing paragraph (c) we keep in mind the clearly expressed purpose of Congress to tax the transmission of property at death, and we also keep in mind the decision of this court in the *Davis* case, *supra*, 264 U. S. 47, that the act in question is not a tax upon the succession and receipt of benefits but is a tax upon the interest of a decedent which ceased by reason of his death.

Property which a man possesses or enjoys up to the time of his death, passes from him and is transmitted by him at the time of his death. He has had the enjoyment of it to the last possible point of time. He relinquishes its enjoyment only when death takes it from him. The transfer of such propertly really takes effect at death and the transfer would properly be held to be within a statute taxing a transfer at death.

We find, then, that Sec. 402 (c) includes in a decedent's estate the value of property transferred in contemplation of death. If a man holds on to his property until death stares him in the face—until, to paraphrase the language of the *Knowlton* case, *supra,* 178 U. S. 41, "death becomes the generating source of his transfer," he transfers his property at death, and his privilege of so doing is properly taxable.

The same situation obtains when a man transfers his property in his lifetime and retains possession or enjoyment until the time of his death. His property in reality is transferred at death and his original transfer should be taxed as one made at death. *His property is transmitted by him, to all practical intents and purposes, at death.*

We contend that Sec. 402 (c), relating to transfers intended to take effect in possession or enjoyment, etc. should be construed to define this class of transfers exclusively,—that is, transfers wherein possession or enjoyment is retained by the grantor until his death. So construed the section provides for including in a decedent's estate the value of property which he has in effect transmitted at death. It defines a transfer which is taxed by Sec. 401.

On the contrary, if Sec. 402 (c) is construed to define property which the decedent has transferred in his lifetime without reserving any interest either in the principal or the income so that nothing passes at the decedent's death, then it would define a transfer which is not taxed by Sec. 401 and a conflict between the sections arises.

Furthermore the statute should be strictly construed in favor of the tax payer. It should not be construed

to assess a tax unless the intention to do so is clear beyond question.

Treat v. *Whitt*, 181 U. S. 264, 267.
Gould v. *Gould*, 245 U. S. 151, 153.
United States v. *Merriam*, 263 U. S. 179, 187.

Sec. 402 (c) defines, as proper to be included in a decedent's estate, any interest in property of which he has made a transfer or trust "intended to take effect in possession or enjoyment at or after his death."

Can the quoted language be reasonably construed to refer only to property the possession or enjoyment of which has been retained by the grantor to the time of his death?

The property referred to is the property of the decedent. Intention with reference to its disposition is *his* intention. The possession or enjoyment referred to is *his* possession or enjoyment.

We contend that it is logical and natural to construe the words "possession or enjoyment" to refer to the possession or enjoyment of the grantor at his death and to the passage of such possession or enjoyment at or after his death.

The language so construed, defines a transfer or trust intended by the grantor to become effective as to his possession or enjoyment at or after his death.

If the language is so construed, it defines a transfer or trust which is taxed by Sec. 401, because possession or enjoyment reserved by the grantor passes from him at or after his death.

On the other hand, if the language were construed to define and include a transfer or trust under which no interest is reserved by the grantor so that nothing passes

from or is transmitted by him at his death, then it would define a transfer which is not taxed by Sec. 401.

The statute in question, as this court stated in the *Davis* case, *supra*, 264 U. S. 47, does not purport to impose a tax upon the *receipt* of property after death, but upon the *passing* of property at death. It does not impose a succession tax. Under the statute is is immaterial when the beneficiaries succeed to property transferred.

There is no basis, therefore, in the statute for measuring the value of a decedent's estate by the value of property transferred absolutely by him in his lifetime because it does not vest in possession or enjoyment in the grantees until after his death.

We respectfully contend that Sec. 402 (c) should be construed to refer only to transfers of property the possession or enjoyment of which does not pass from the grantor until at or after his death. It is only by such construction that the subject matter of the transfer can be brought within the purpose and language of the taxing clause of the statute.

This construction also avoids a possible question as to the constitutionality of the statute.

This construction eliminates the question whether the act is intended to apply to transfers *inter vivos*. The constitutionality of an act to tax such transfers has been seriously questioned.

McNeir v. *Anderson*, 10 Fed. (2d) 813.

Le Feber v. *Wilkinson*, (Wis. Dist. Ct.) 1926 Commerce Clearing House, 7673.

Blodgett v. *Holden* (C. C. A. 6th Circuit. Not yet reported, certified to the Supreme Court on questions of constitutionality).

It eliminates the question whether Congress has a con-

stitutional right in fixing an estate tax to measure the value of the decedent's estate by adding the value of property which did not pass from him at his death.

Llewellyn v. *Frick*, 268 U. S. 238, 239.

We contend therefore that the transfer in trust from Shukert is not within the meaning of Sec. 402 (c) properly construed and that the property transferred thereby should not be included as part of his taxable estate.

It was recognized by the trial court that the transfer made by the Stuckert trust deed would not normally be subject to an inheritance tax. In his charge to the jury the court said:

> "Now in the absence of an express provision of the statute *a tax on inheritances certainly would not reach that conveyance.* (Rec., 118.) * * * It is conceded that Shukert had a right to make an absolute gift at that time of his property and it would not have been taxable under the Statute, but that is not what he did and this Statute was intended clearly, as it seems to me, *to reach out beyond the ordinary operation of the law of inheritance* and reach these transactions, proper transactions, lawful transactions, no question of that kind involved that there is anything wrong about it, and no trick about it, and no device or any intention to defeat any tax manifested here, but that the express language of the Statute *reaches out beyond the ordinary operation of the law of inheritance* and reaches and extends to these trusts." (Rec., 119.) (Italics ours.)

Obviously the court was of the opinion that an absolute deed by a man in his lifetime was not ordinarily a subject for an inheritance tax. Some statute had to *reach out* for it and bring it where it did not normally belong.

We submit that statutes imposing taxes should not be

so construed that they *reach out* for subject matters of taxation not ordinarily within their scope.

A reasonable construction which does not result in such *reaching out* should be adopted.

We therefore contend that, *reasonably* construed, the provisions of Sec. 402 (c) should be limited in their scope to transfers of property, the possession or enjoyment of which was retained by the transferror until his death, such transfers being in effect made at death and being taxed by Sec. 401.

A provision taxing transfers intended to take effect in possession or enjoyment after death appeared for the first time in a statute passed by Pennsylvania in 1826.

> Digest of Acts of Assembly of Pennsylvania, 1824 to 1829, p. 19.

The decisions of the courts of Pennsylvania construing the statute support our contention in this case.

In *Wright's Appeal* (1861), 38 Pa. St. 507, a transfer in trust was taxed as part of the grantor's estate because the transfer reserved to him the income of the property for life.

In *Waugh's Appeal* (1875), 78 Pa. St. 436, the grantor deeded property, reserving the use of it so long as he lived. The property was taxed as part of his estate.

The case of *Reish* v. *Pennsylvania*, 106 Pa. 521, involved an absolute transfer by a decedent made ten days before his death; the grantee gave back a bond to pay the income of the property to the grantor. The transfer was taxed and the court said (p. 526):

> "The policy of the law will not permit the owner of an estate to defeat the plain provision of the collateral inheritance tax law by any device *which secures to him for life the income, possession and enjoyment thereof. It must be such a conveyance as*

parts with the possession, the title and the enjoyment in the grantor's lifetime." (Italics ours.)

To the same effect are *Lines Estate,* 155 Pa. 378, 26 Atl. 728; *Todd's Estate,* 237 Pa. 466, 85 Atl. 845.

But in Pennsylvania a transfer by which the grantor parts with all interest in the property is not taxed, although the principal of the estate is not to vest in the beneficiaries until long after the death of the grantor.

The case of *Dolan's Estate,* 279 Pa. 582, 124 Atl. 176, involved a trust under which the income was payable to the three sons of the grantor. The principal was to be distributed twenty-one years after the death of the last surviving lineal descendant living "at the time of the death of the grantor." The transfer was held not taxable either as to income or principal as the grantor had retained no interest in the trust estate.

The same trust conveyance was before the Federal Court on a claim that the transfer was subject to tax under the Revenue Act of 1918, and the transfer was not taxed.

Fidelity Trust Co. v. *McCaughn,* 1926 Commerce Clearing House 7648.

In *Dos Pasos on Inheritance Tax Law,* 2nd Ed. p. 329, the author reviewed the Pennsylvania cases and said:

"* * * The general rule established by these authorities is that the tax is payable on all property transferred by deed, grant, etc., to collateral or lineal heirs or strangers made or intended to take effect in possession or enjoyment at, on, or after the death of the grantor or transferor, the policy of the law being not to permit the owner of an estate to evade or defeat the tax by any device which secures to him for life the income, profit, or enjoyment of an estate where, after death, the corpus of the estate or any part thereof shall inure to the benefit of persons who are not exempted. Hence,

it would seem that payment of the tax can only be defeated or avoided by such a *bona fide* conveyance as *parts absolutely* with the possession, title, and enjoyment in the grantor's lifetime. (Italics ours.)

* * * * *

* * * The manifest purpose of our collateral inheritance tax is to subject property limited by deed in the manner stated in the statute of taxation, *because it is still substantially the property of the grantor,* and does not actually pass, nor is it intended to pass, to the beneficiaries until his death, and hence it is essentially similar in that respect to a devolution of the property, by testacy or intestacy upon the death of the owner." (p. 333) (Italics ours.)

In New York State an inheritance tax law containing this same language has been in force since 1885, and has been often construed. In that connection it was said in one of the New York cases, decided in 1921:

Cochrane's Estate, 190 N. Y. Sup. 895, 902.

"It is significant that in every reported case in the Court of Appeals, where the gift was taxed, *the enjoyment of the income was retained by the donor.*" (Italics ours.)

The Illinois statutes have contained the same language since 1895.

In the case of *People* v. *Moir,* 207 Ill. 180, the grantor made gifts to his sons. It was contended that the gifts were made to take effect in possession and enjoyment after his death. The rents of the property went to a partnership in which the grantor owned a half interest, so that he indirectly received one-half of the rents of the deeded properties. Only to the extent of this one-half interest the property was taxed as part of his estate.

In the case of *People* v. *Kelly,* 218 Ill. 509, property was deeded in trust and the grantor reserved an interest during his life to the extent of $200 a month. Only to the

extent of the interest reserved the property was taxed as part of his estate.

In *Keeney's Estate*, 194 N. Y. 281, there was involved the taxation as part of the decedent's estate of property which she had conveyed upon trust to pay to her during life one-fourth of the income, to pay the remaining three-fourths of the income to her children, and after her death to transfer the principal to her children. Only one-fourth of the property was taxed as a part of her estate. The remainder of the property which passed to the children at her death *was not taxed.*

The case was affirmed in this court in *Keeney* v. *Comptroller*, 222 U. S. 525, but the question here discussed was not involved or decided.

To the same effect are:

Bullen v. *Wisconsin*, 240 U. S. 625.
Carter v. *Bugbee*, 92 N. J. L. 390.

We have found no reported case which goes to the length of this *Shukert* case, 6 Fed. (2d) 551, and which holds that transfers in trust are taxable unless all interests passing under the transfer come into the actual possession and enjoyment of the beneficiaries within the lifetime of the grantor. If this is the correct construction of the act, an estate tax would be levied on every executed trust which by its terms fixes the termination of the trust period at a date subsequent to the death of the grantor.

In *Keeney's Estate*, 194 N. Y. 281, *supra*, one-fourth of the trust estate in which the grantor had the income was taxed but three-fourths of the trust estate which were to vest in interest on the grantor's death were not taxed.

In the *Dolan* case, cited above, 279 Pa. 582, the trust could not possibly have terminated until long after the

decedent's death, as it was expressly provided in the deed of trust that the principal was to be distributed twenty-one years after the death of the last survivor of the lineal descendant "living at the time of the death of the grantor." Yet neither the principal nor the income was taxed. In referring to transfers intended to take effect in possession or enjoyment, etc., the court said:

> "To escape the latter provision a conveyance must be such as parts with possession, title and enjoyment in the grantor's lifetime." (p. 588.)

The words "intended to take effect in possession or enjoyment at or after death" appear in every inheritance tax statute enacted in this country beginning with the Pennsylvania statute enacted in 1826.

If they are applicable to remainders vesting in possession at a date which may be after the date of the grantor's death, it is strange that in some court at some time there has not been an adjudication to that effect.

It is no answer to our contentions in this case for respondent to claim that trusts like the Shukert trust are an evasion of the taxes imposed by the Revenue Act of 1918 and that Sec. 402 (c) was incorporated in the act to prevent such evasions.

An outright gift in trust is no more an evasion of the statute than an outright gift of money. In each case the donor's estate is depleted by the amount of the gift. He has less estate subject to inheritance tax at his death. But he has not evaded taxation in one case any more than in the other.

The remedy, if one is needed, can be provided by Congress. The gift tax in the Revenue Act of 1924 was passed to reach gifts of the kinds suggested above. The gift tax has been abandoned. We may assume therefore that Congress is no longer concerned with the loss of

revenue resulting from gifts not made in contemplation of death.

Why then should the courts be asked to legislate, by judicial construction, in a field which Congress has abandoned?

The Government is attempting in this case to tax a completed gift *inter vivos* under the pretense of levying an estate tax.

Our contention is still further supported by the uniform decisions of the courts in cases where attempts have been made to tax proceeds from a life insurance policy within the clause "to take effect in possession or enjoyment at or after death." In the case of a policy of life insurance payable to a beneficiary other than the estate of a decedent, it is obvious that the premiums paid by the decedent during his lifetime constitute, to the extent of the insurance bought by those premiums, a gift to the beneficiary named in the policy. It is also obvious that the beneficiary acquires the actual possession and enjoyment of nothing whatsoever until the death of the insured. Yet even in the cases where the insured, the decedent, has retained a power of revocation and change as to the beneficiary up to the date of his death, it has been uniformly held that the proceeds from such an insurance policy are not a transfer taking effect in possession or enjoyment at or after the death of the decedent.

Gleason & Otis Inheritance Taxation, 157.

In re Bullen's Estate, 143 Wis. 512; 128 N. W. 109.

In re Voorhees' Estate, 193 N. Y. Sup. 168.

In re Parson's Estate (N. Y.), 102 N. Y. Sup. 168.

Tyler v. *Treasurer,* 226 Mass. 306; 115 N. E. 300.

Frick v. *Lewellyn,* 298 Fed. 803.

The opinion of the District Court of Massachusetts in *Bradley* v. *Nichols*, 13 Fed. (2d) 857, states our contention in this case admirably. Mrs. Bradley, the decedent, contributed $730,000 to a trust fund, one-half of the income of which was payable to her for life, the remaining one-half to her children and, on her death, the principal went to the remaindermen. It was conceded that one-half of her contribution was taxable as part of her estate. The government contended that the whole sum was taxable. The court said:

> "It would be mere fiction to say that Mrs. Bradley expected to survive all her three daughters and their issue, or that her action was in any appreciable degree influenced by that consideration, and the government does not put its claim on any such ground. Its position is that, where 'the persons who will take the corpus upon the termination of the trust cannot be absolutely ascertained until after the death of the founder,' the property transferred is taxable as part of the estate of the transferor. The principle contended for is that, not only must the transfer of the property be absolute and complete before death but the trust must be complete before death to its final limitation, or the statute applies. That this is a very extreme view can hardly be denied. The argument is that the statute requires it.
>
> The present case goes much beyond *Coolidge* v. *Nichols* (D. C.) 4 F. (2d) 112, and *Safe Deposit Co.* v. *Tait* (D. C.) 295 F., 429, which dealt with trusts in which the donors reserved life estates, and in which it was held that the transaction considered as a whole amounted to a transfer of the property to take effect on the donor's death. *Shukert* v. *Allen, Collector*, 6 F. (2d) 551 (C. C. A. 8th), supports the government's contention that the language of the statutes refers to the time when the final possible *cestui* will get the benefit of the trust. On the other hand, in *Dexter* v. *Treasurer and Receiver General*, 243 Mass. 523, 137 N. E. 877, the Supreme Judicial Court of Massachusetts, construing a state statute, the language of which upon this point is practically identical with that of the federal statute under dis-

cussion, reached a very different conclusion, and held that what was meant by 'taking effect in possession or enjoyment' was the definite determination of interests, whether legal or equitable, and that if such interests are established during the donor's life, and are in no way contingent upon his death, 'the beneficial interest in the employment of the proceeds of the trust passed at the time of its execution. * * * The possession and enjoyment vested in the beneficiaries when the trust deed was delivered to the trustees. The deed passed the property from the donor and gave to the beneficiaries at that time the beneficial interest in it, and their enjoyment and possession of it was not contingent on the death of the donor.' Carroll, J. 243 Mass. 526, 137 N. E. 879. This seems to me a more reasonable view of the language and scope of such a statute as I am dealing with than that taken in *Shukert* v. *Allen, supra.*

(2) The United States has no power to tax gifts *inter vivos,* except to the extent that they are so related to the death of the donor as to constitute in fact an anticipated succession to his property. The extent to which the state may go in arbitrarily connecting gifts *inter vivos* with the donor's subsequent death occasioned a difference of opinion among the justices in *Schlesinger* v. *Wisconsin,* 46 S. Ct. 260, 70 L. Ed.—(March 1, 1926). Under the Shukert decision it would follow that the owner of property cannot give it away in such a manner that the final disposition of it is not ascertained at the time of the donor's death.

In effect that decision restricts the right of gift. This point is not referred to in the opinion and may not have been considered. With great respect to the learned court which decided *Shukert* v. *Allen,* the constitutionality of the statute so interpreted seems to me very doubtful. To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part of the donor's estate, is to say something which is simply not true. Certiorari has been granted by the Supreme Court in the Shukert case (46 S. Ct. 24, 70 L. Ed. .....), and it therefore lacks finality."

"Without undertaking to discuss the numerous decisions which have been referred to, I may say that in my judgment the law, in taxing as part of decedents' estates property of which they had completely divested themselves before death, has already gone to the extreme limit which can be candidly defended, and that the enormous extension of it contended for by the government in this case is not fairly within the contemplation and meaning of the statute in question, and, if it be within the meaning, the statute is to that extent unconstitutional."

In Shukert's deed of trust the beneficial interests of the children who are named as beneficiaries were definitely and finally fixed at the time of the delivery of the deed of trust. They were in no way contingent upon Shukert's death. The children had the same rights on the day following his death that they had on the day before. His death was not a factor in any way in determining the rights of the beneficiaries of the trust.

Shukert retained no interest of any kind in the trust estate. Nothing remained in him which he could transmit at his death.

We contend that his transfer was not within the language or the purpose of the taxing statute.

II.

As an additional and independent reason for the conclusion that this trust is not taxable, we submit that, even with reference to the beneficiaries of the trust, it did in fact take effect in possession and enjoyment in the grantees at the time of its execution and delivery.

There can be no question that the Shukert trust was a completely executed trust.

The definition of executed trusts is found in 2 Pomeroy's Equity (2nd ed.) Par. 1001, where it is said:

"A trust is executed when no act is necessary to

be done to give effect to it when the trust is fully and finally declared in the instrument creating it."

In Par. 998 the author said:

"If the donor makes a complete conveyance of real property or assignment of personal property sufficient to vest the legal title in the donee; or if he completely conveys or assigns the property to a Trustee upon trust effectually created on behalf of the donee; or if he retains the legal title but effectually declares himself a trustee for the donee, thus clothing the donee with all the beneficial estate—then in each of these instances the gift is valid, although voluntary; the donee's rights are perfect and equity will enforce them against the donor and all persons claiming under him as volunteers."

Shukert's deed of trust was executed and delivered in Nebraska and is to be construed according to the laws of Nebraska.

In *Morris* v. *Linton*, 74 Neb. 411, an executed trust was defined as follows:

" 'The distinction between trusts executed and executory is this: A trust executed is where the party has given complete directions for settling his estate with perfect limitations; an executory trust is where the directions are incomplete and are rather minutes or instructions for the settlement.' "

This definition was quoted from *Nebbs* v. *Scott*, 9 How. 196, 211.

By the Shukert deed of trust the property was transferred absolutely to the trustee. The trustee was given complete power and dominion over the property. The rights of the beneficiaries were clearly, definitely and irrevocably declared. The donor reserved no right of control or interest of any kind in the trust property. Nothing remained to be done to complete the trust.

It was a completely executed trust upon delivery. Pos-

session of the trust property passed at once to the trustee; to the extent of its fees, the trustee acquired a beneficial interest in the trust.

The trust transfer clearly took effect in possession during the life of the grantor.

Did it take effect in enjoyment?

One of the definitions of "enjoy" given by Webster is "to have the benefit of."

The word "enjoy" means to have, possess and use with satisfaction; to occupy or *have the benefit* of.

Board of Trustees v. *Dimmitt,* 113 Mo. App. 41, 45.

Upon the delivery of the deed of trust, the beneficiaries acquired an interest in a large fund, in which they had previously had no interest. The income of the trust fund began at once to accumulate for their benefit. The deed of trust contained no spendthrift provisions. It contained no restrictions upon the right of the beneficiaries to alienate their interests under the trust. They acquired a right to sell and transfer their interests.

They were in enjoyment of substantial benefits under the deed of trust immediately upon its execution.

The right to receive the trust property on February 1, 1951, was given to three named beneficiaries, Isabel C. Shukert, Gustave Emil Shukert and Flora G. Shukert. They were given the fixed right of enjoyment.

This right they acquired in their father's lifetime and the right was in no way affected by his death. Whether he lived or died their interests remained unchanged.

We contend that the beneficiaries acquired a vested interest under the trust deed, which was subject to be di-

III.

If the court holds that the instruction to the jury in this case was wrong, then the decisions of the District and the Circuit Court of Appeals should be reversed and the case remanded to the District Court for another trial.

The petitioners will then have the right to have submitted to a jury the question of fact, whether the deed of trust was made in contemplation of death.

It was contended in the Circuit Court of Appeals that in as much as both the plaintiffs and defendants requested the court to direct a verdict, there was no question left to be submitted to the jury.

The complaint in the District Court alleged that the deed of trust was not made in contemplation of death. (Rec., 8.)

The petitioners moved the court for peremptory instruction to the jury to find for the plaintiffs. (Rec., 112.)

It does not appear from the record that this motion was passed upon by the court.

It was in effect overruled, since the court instructed the jury to find for the defendant because "under the undisputed evidence the trust created by Gustave E. Shukert in his lifetime was intended to take effect in possession or enjoyment at or after his death." (Rec., 114.)

This court said, in *Empire State Cattle Co.* v. *Atchison Railway Co.*, 210 U. S. 1, 8:

> "It was settled in *Beuttell* v. *Magone, supra,* that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts

to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction and yet, upon the refusal of the court to give it, insist by appropriate requests upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent."

To the same effect are *Schmitt* v. *Bank of Commerce*, 234 U. S. 64, 66; *Sampliner* v. *Motion Picture Co.*, 254 U. S. 233.

We respectfully submit that the judgments of the District Court and the Circuit Court of Appeals should be reversed and this case remanded to the District Court of Nebraska, Omaha Division, for a new trial.

Respectfully submitted,

ARTHUR F. MULLEN,
WILLIAM B. MCILVAINE,
J. F. DAMMANN, JR.,
Counsel for Petitioners.

1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty ($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. Any and all such sums paid in this manner to any of the beneficiaries hereinafter named shall constitute a charge upon and shall be deducted from their share, or the share they would have taken if living, of the Trust Fund at its termination.

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above named children of the Founder shall die leaving issue before the termination of this Trust, then the share in said Trust Fund of the one so dying then shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issue shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above named beneficiaries shall die without issue before the termination of this Trust, then the share

he or she would have taken if living shall be divided among the surviving beneficiaries *per stirpes* and not per capita.

3. Investments and reinvestments of said Trust Fund may be made by the Trustee at any time as may be in the best interest of the Trust Fund.

4. Investments and reinvestments are to be made preferably in United States, State and Municipal Bonds, and in such other securities, not including stocks, as are legal investments for trust funds.

5. The Founder at any time hereafter may deliver to the Trustee additional property for the purpose of adding to the principal of the trust fund created by this instrument. In this case the Founder shall file with the Trustee an instrument in writing duly signed by himself describing such additional property and stating that he delivers the same for the purpose of making it a part of the principal of the trust fund created by this instrument. The Trustee, upon receiving such additional property and such written instrument, shall in writing acknowledge receipt of said property as a part of the Trust Fund created by this instrument, and deliver, or mail by registered letter, a copy of said receipt to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund. All such additional property which has been so delivered to and so received and receipted for by the Trustee as such under the provisions of this article, and any additional property received hereunder by the Trustee as such from any source shall be deemed to be and is hereby assigned, sold, transferred, set over and delivered to the Trustee in trust for the uses and purposes and especially subject to all the terms, conditions and provisions in this instrument contained and set forth. It is hereby agreed that all of said property when and if so received by the Trustee is received by it in trust and the Trustee hereby declares and agrees that it will hold the same (if and when it has been so received) together with all money and all property of every kind and character for which the same or any of the same may at any time be exchanged or which may in any manner result from or grow out of the same for the uses and purposes and especially subject to all the terms, conditions and provisions contained and set forth in this instrument to

the same effect as if such additional property so received by the Trustee under the provisions of this article or from any other source had been received by the Trustee as a part of the original trust fund at the time of the execution of this instrument.

6. It is understood and agreed that the trustee shall receive as compensation of its services a sum equal to three (3%) per cent. of the income from said trust fund and shall be reimbursed for all necessary expenses in connection therewith. In no event is the Trustee to receive or be paid any compensation for collecting the principal funds of said trust, or for investing or reinvesting any funds belonging to said trust.

7. It is understood and agreed that the Trustee shall make annually a report in writing of its acts and doings as such Trustee showing income received, disbursements and charges, investments and reinvestments, and deliver or mail by registered letter, a copy of such report to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund.

8. Immediately after the execution of this agreement, the Trustee shall prepare and deliver to the wife of the Founder, if living, and to each of the beneficiaries, above named, a duly certified copy of this instrument.

Signed this 5th day of May, A. D. 1921.

G. E. SHUKERT,

UNITED STATES TRUST COMPANY OF OMAHA, NEBRASKA, AS TRUSTEE,

By ABRAHAM L. REED,
President.

Witnesses:

M. B. GULICK,

SARAH M. LEMLEY.

FILED
MAR 7 1927
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 193

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEBRASKA,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

ARTHUR F. MULLEN,
WILLIAM B. MCILVAINE,
J. F. DAMMANN, JR.,
Counsel for Petitioners.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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REPLY BRIEF OF PETITIONERS.

I.

In the brief for the respondent frequent reference is made to the case of *Nichols* v. *Coolidge,* which was recently argued in this court and to the brief filed for the Government in that case. (No. 88, October term, 1926, argued January 6 and 7, 1927.)

In the Coolidge brief (pp. 16, 17, 20) counsel cite, in support of their contention that it is only when the bene-

ficiaries have the use and disposal of the property, without reference to the time of the donor's death, that the gift is not within the statutory language, namely, gifts made to take effect in possession and enjoyment at or after death, the following cases:

Re Waugh Estate, 78 Pa. 436.
In re Einstein, 114 Misc. 452, 186 N. Y. Supp. 931.
In re Bottomley's Estate, 92 N. J. Eq. 202.
In re Fulham's Estate, 96 Vt. 308.
In re Edgerton's Estate, 103 Misc. 471, 170 N. Y. Supp. 222.
Safe Deposit Trust Co. v. *Tait*, 295 Fed. 429.
Stark, Ex'r. Schmidlapp v. *U. S.* 14 Fed. (2d) 616.
McCaughn v. *Girard Trust Co.* 11 Fed. (2d) 520.
Reish v. *Commonwealth*, 106 Pa. St. 521.
Re Jones Estate, 65 Misc. 121, 120 N. Y. Supp. 862.
People v. *Danks*, 289 Ill. 542.
In re Keeney, 194 N. Y. 281.
In re Todd's Estate, 237 Pa. 466.

In all of the above cases, with the exception of *People* v. *Danks, the grantor retained, by some method or other, the income of the property conveyed*, and a transfer tax was sustained in each case for that reason.

The case of *People* v. *Danks*, 289 Ill. 542, involved a gift which was taxed because made in contemplation of death.

The above cases certainly do not support counsels' proposition, that "the settled construction" of the phrase "intended to take effect in possession and enjoyment at or after death" is as they contend.

Coolidge Brief, p. 17.

In support of the proposition that transfers are held to be taxable, although the donor reserves no interest in the property, counsel cite the following cases from Massachusetts and New York:

New England Trust Co. v. *Abbott*, 205 Mass. 279.
State Street Trust Company v. *Treasurer*, 209 Mass. 373.
In re Patterson, 146 App. Div. 286; 130 N. Y. Supp., N. Y. S. 970.
In re Cruger, 54 App. Div. 405.
Matter of Dunlap, 205 App. Div. 128; 199 N. Y. Supp. 147.

These decisions are based upon the inheritance tax statutes of Massachusetts and New York respectively, which differ materially from the estate tax provisions of the Revenue Act of 1918. In both Massachusetts and New York a tax is expressly imposed by the statute upon the transfer of any property when the transfer is made by deed, grant or gift made in contemplation of the death of the donor or intended to take effect in possession or enjoyment at or after his death. They levy succession and legacy taxes, while in Section 401 of the Revenue Act of 1918 the tax is imposed "upon the transfer of the net estate of every decedent dying after the passage of this act." The statutes are so radically different in terms that the decisions in New York and Massachusetts should not control the construction of the Federal statute.

Furthermore in each of the above cases by the terms of the transfers which were taxed it was expressly provided that the property should pass and it did in fact pass *at the death* of the grantor or donor. This fact apparently was of controlling weight in determining the decision of the court.

Counsel also refer to the case of *Vanderbilt* v. *Eidman*,

196 U. S. 482. That case involved the construction of the Federal inheritance tax law of 1898 which was strictly a tax upon successions and was drafted with especial reference to the interests taken by distributees or transferees.

II.

Counsel for the respondent contend that Section 402 of the Federal statute does not define the properties the transfer of which is taxed by Section 401.

They admit that Section 401 taxes only the transfer of property which the decedent owned at the time of his death.

They contend that Section 402 merely furnishes the measure of the tax which is imposed by Section 401.

The necessary and logical result of this contention is that if a decedent dies owning no property which passes at his death, then no tax is imposed by the statute. There is no tax to be measured by Section 402.

The result of this contention is that if a man owning a large estate transfers his entire estate in contemplation of death or after reserving all income until his death, and dies penniless the statute imposes no tax. Nothing passes at his death which is taxed by Section 401.

There is no tax, therefore, to measure and Section 402 has no application. Decedent's estate escapes all taxation.

We submit that the argument of counsel leads to a result which condemns the argument.

If Section 402 is to be construed merely to furnish a measure of the tax imposed by Section 401, then the question remains whether Congress has power to measure a

tax upon the transfer of a decedent's estate at his death by the value of property which did not pass from him at his death.

It is undoubtedly true that the amount of an excise tax may be measured by the value of property which could not be directly taxed.

The property used as a measure, however, must bear some direct relation to the commodity taxed.

In the case of this excise tax the commodity taxed is the right to transfer property at death.

There is no authority for the proposition that a tax upon such a commodity can be measured by the value of property which did not pass at death and therefore bears no relation to the commodity.

In *Maxwell* v. *Bugbee,* 250 U. S. 525, this court, by a divided court, sustained the validity of an excise tax levied by the State of New Jersey which was measured in part by the value of property outside of the state and which the state had no power to tax.

The property the value of which was used in measuring the tax was property of the decedent which passed at his death.

The property used as a measure bore a direct relation to the value of the commodity which was being taxed, that is, the right to transfer property at death.

The amount of a privilege or commodity tax cannot be measured by the value of property which is not directly connected with the privilege or commodity taxed.

In the case of *Flint* v. *Stone-Tracy Company,* 220 U. S. 107, the commodity taxed was the right to do a corporate business, and it was held that the measure of the tax by the gross income of the business was valid as such income directly reflected the value of the commodity taxed.

Property which is in reality the subject matter of the privilege or commodity can be taken into consideration as a measure of the tax upon the commodity, although the property itself may not be directly taxable; but there is no authority for the proposition that property which is not directly connected with the privilege or commodity taxed can be used as a measure of a tax upon the privilege or commodity.

Furthermore, Section 409 of the statute provides that the transferee, trustee or beneficiary shall be personally liable for the tax in the event that the tax is not paid by the decedent's estate. It results that if the tax is imposed and paid by some one other than the decedent's estate, *without reference to whether or not the decedent had at his death any interest in the property which was transferred,* then the tax becomes a direct tax against the owner of the property because of the fact of his ownership. This raises a serious constitutional question. *Llewellyn* v. *Frick,* 268 U. S. 238.

We contend further that the argument of counsel for the respondent leads to the conclusion that under the guise of measuring an excise tax upon a transfer at death by the value of a gift *inter vivos,* the statute in effect imposes a gift tax.

The constitutionality of a gift tax is now before this court for determination.

Blodgett v. *Holden,* Docket Number 779.

Should a construction of the Estate Tax statute be adopted which raises this serious constitutional question?

III.

In the summary of their argument counsel state "the intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testatmentary." (p. 6.)

We find nothing in the letter of the law which requires that there shall be included in a decedent's gross estate the value of property included in a trust which is in substance and effect though not in form testamentary.

The intention of Congress is to be determined by a proper construction of the language used in the act.

It is no answer to the arguments in our brief (that Congress did not intend by the act in question to tax the transfer of property which did not pass from the decedent at his death) to say that it was the intention of Congress to tax testamentary dispositions.

Moreover the essential features of a testamentary disposition of property are two: first, that the act of the grantor is ambulatory, that is, always subject to revocation; and, second, that *no* property or interest in property passes or vests under the disposition *in any one* until the death of the grantor.

Patterson v. *McClenathan,* 296 Ill. 475.
Bullard v. *Suedmeier,* 291 Ill. 400.
Bromly v. *Mitchell,* 155 Mass. 509.
Deifendorf v. *Deifendorf,* 132 N. Y. 100.
1 Page on Wills, paragraphs 35-50-61-68-69.

If by testamentary disposition counsel for respondent means a disposition under which the grantor retains

property until his death, we agree that Congress intended by the act in question to tax the transfer of such interests.

But the transfer involved in this proceeding was not in any way testamentary in character. It was not in substance or effect testamentary.

The transfer by Shukert under his deed of trust was complete and irrevocable at the time it was made. He divested himself of all interest in the trust property and title thereto vested in the grantee.

We contend that the transfer was not taxed by the Revenue Act of 1918.

IV.

Counsel in their brief contend that it was Shukert's express intention that the beneficiaries under the trust should receive nothing until after his death. (pp. 2, 5, 9, 10, 11, 12, 13.) On page 12 of their brief counsel state that the beneficiaries do not dispute the fact that Shukert intended to postpone the possession and enjoyment of the trust property until after his death. In support of their contention counsel have attached to their brief extracts from the evidence. We may assume that they have set forth all the testimony which they regard as pertinent.

The position of the petitioners is that the facts shown in the record do not justify the conclusion that Shukert intended that the date fixed for the termination of the trust should be beyond the date of his death.

The record shows that on or about February 1, 1921, Shukert sold a piece of real estate in Omaha. (R. 43.) He received in payment $35,000 in cash; 10 notes for $5,000 each, payable yearly over a period of ten years, and one note for $140,000, payable February 1, 1951,

thirty years after the date of the note. The property sold was property in which he started in business. (R. 66.) His wife testified that when he decided to sell the building he said:

> "* * * Now we will take this building we worked so hard for and put this away for the children when they get older so that they will surely have something in their old age." (R. 66.)

The cash and notes received for the properties sold constituted the property conveyed by Shukert in trust. The due date of the last maturing note was fixed as the date of the termination of the trust.

Shukert's controlling intent was that the trust should terminate at the date of the maturity of the last maturing purchase-money note. Whether that date would be before or after his death was immaterial. The date was not selected by him because it would probably be after his death. One witness (Harver) so distinctly testified. (R. 47.)

No reference is made in the deed of trust to the death of Shukert. Shukert was fifty-six years of age at the date of the creation of the trust. It was within the range of possibility that he would live beyond the date of its termination. Whether he was alive or dead at the date of the termination of the trust was a matter which did not in any way affect the trust.

It is our contention that the evidence does not establish that it was the controlling intention of Shukert that the trust should terminate after his death. We contend that the date for the termination of the trust was selected by Shukert without reference to the date of his death. It is certain that his death had nothing to do with the possession and enjoyment of the trust property either by himself or by his children.

V.

If the contention of the respondent in this case prevails then a new field of taxation is opened up to the Government. Many trusts are created yearly by grantors for their dependent children in which the trusts may possibly terminate after the death of the grantor.

The Government, relying upon the decision of the Circuit Court of Appeals in this case, is taxing all interests under such trusts which are not certain to vest in possession and enjoyment prior to the death of the grantor in the trust. We submit that the construction placed by the lower court upon the Estate Tax Law in this case was not intended by Congress. The construction contended for should not be adopted by this court.

Respectfully submitted,

ARTHUR F. MULLEN,
WILLIAM B. MCILVAINE,
J. F. DAMMANN, JR.,
Counsel for Petitioners.

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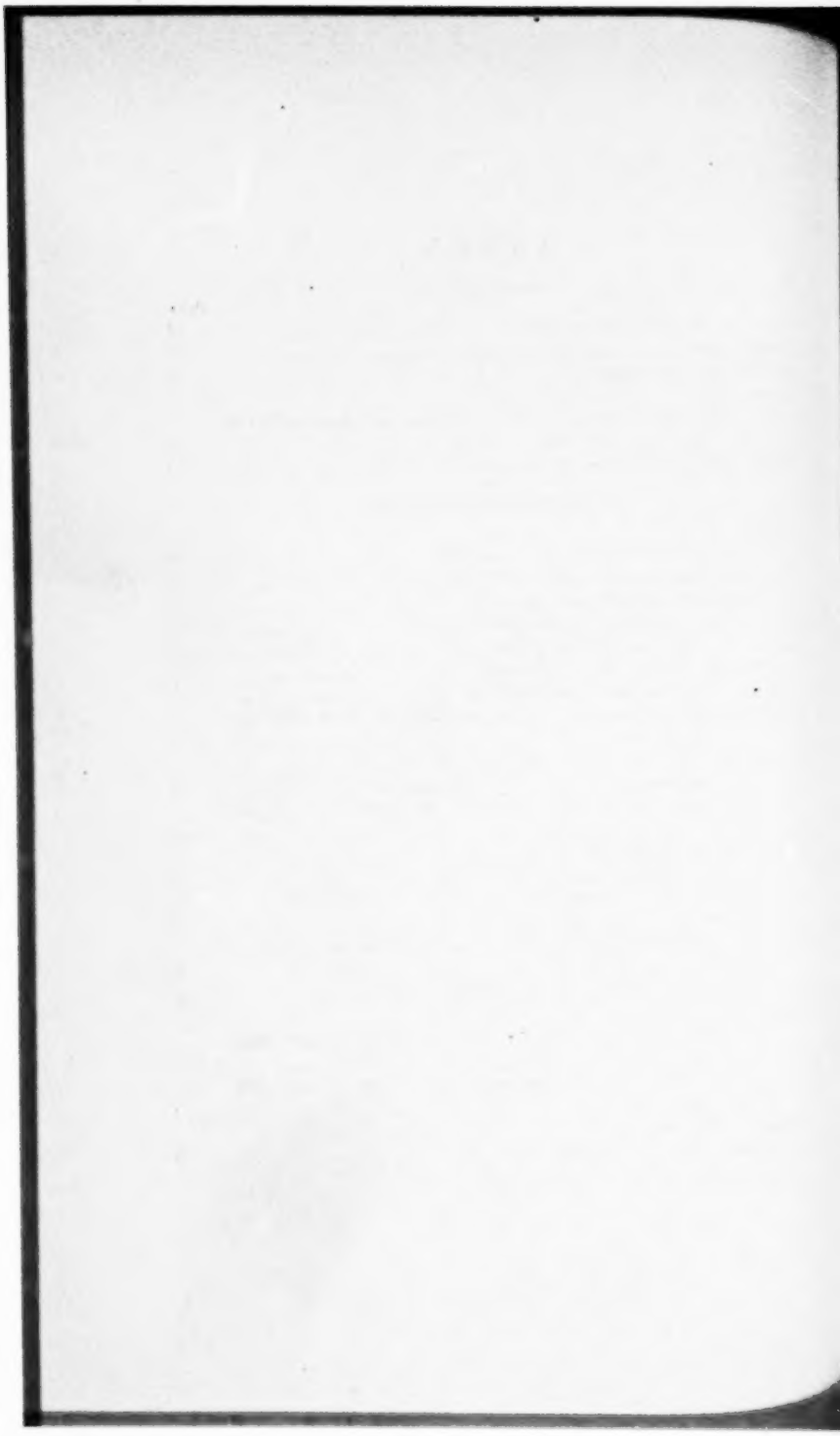

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 653

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED, PETITIONERS

v.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS OF THE LOWER COURTS

The opinion of the United States District Court for the District of Nebraska will be found reported in 300 Federal 754. The opinion of the Circuit Court of Appeals for the Eighth Circuit has not yet appeared in the Federal Reporter. It will be found, however, at page 188 of the transcript of record.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered May 15, 1925. Petitioners have set forth in their brief (pp. 8, 9, 10, 15) the authorities under which they apply to this Court for writ of certiorari.

STATEMENT OF THE CASE

One Gustave E. Shukert died testate on October 29, 1921, at Omaha, Nebraska (R. 1). Shortly prior to May 5, 1921, he sold a piece of real estate which he then owned, for the sum of $225,000. Of the purchase price, $35,000 was paid in cash; the balance of $190,000 was secured by mortgage and was evidenced by ten notes payable, respectively, in 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 years, each for $5,000, and one for $140,000, payable in 30 years (R. 9, 10).

On May 5, 1921, after negotiations, Shukert transferred the proceeds of this sale to the United States Trust Company in trust for the following purposes:

> 1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty

($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. Any and all such sums paid in this manner to any of the beneficiaries hereinafter named shall constitute a charge upon and shall be deducted from their share, or the share they would have taken if living, of the Trust Fund at its termination.

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above-named children of the Founder shall die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such

> issue, if one the whole, if more than one then in equal shares, provided, however, that such issues shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above-named beneficiaries shall die without issue before the termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita. (R. 29.)

The trust instrument is set out in full as Plaintiffs' Exhibit No. 1, at page 28 of the record.

At the time this trust was created, and shortly prior thereto, Shukert stated that he intended the trust to terminate and the corpus and accumulated income to be distributed to the beneficiaries after he had died (R. 48, 49, 57, 58, 78, 163, 164, 167).

After Shukert's death the executors filed a return for the purpose of Federal estate taxes under the provisions of the Revenue Act of 1918 (40 Stat. 1057, Ch. 18). They did not include in the gross estate the value of the securities transferred to the trustees (R. 85). Upon investigation and reaudit the Commissioner of Internal Revenue determined that this value was a part of the gross estate, because the transfer and trust was within the provisions of Section 402 (c) of the Revenue Act of 1918, *supra*, which provides:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

This addition to the gross estate resulted in an additional tax amounting to $13,685.47, which was paid under protest and this suit brought for its recovery. The District Court gave judgment for the respondent (R. 19), and upon writ of error (R. 22, 23) the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment (R. 192).

Petitioners now seek a further review by certiorari from this Court.

GROUNDS FOR THE WRIT

Petitioners seek the writ in substance upon the ground that the court erred in holding that the transfer and trust was, within the meaning of Section 402 (c) of the Revenue Act of 1918, "intended to take effect in possession or enjoyment at or after" decedent's death.

ARGUMENT

I

The rulings of the lower courts are in accord with the law and decisions

Decedent's purpose in deferring the distribution of the trust property for thirty years is perfectly obvious. It was to prevent the beneficiaries from coming into the possession or enjoyment thereof until after his death. He expressly so declared (R. 163, 164). Therefore, since Section 402 (c) by its terms makes the propriety of the inclusion of such property in the measure of the tax dependent upon the intention of the donor, it is manifest that the value of the trust property involved in the instant case was properly included. As stated in *Conway's Estate* v. *State,* 120 N. E. 717 (p. 719), the rule is:

> If the facts and circumstances shown by the evidence, in connection with the conveyances and the reservation of full possession by the grantor to the date named in the deeds, reasonably authorize the inference that in fixing such date the grantor contem-

> plated that his death would occur on or before the date so named in such reservation, it would follow that the transfers were made to take effect at or after the death of the grantor within the meaning of the statute.

There can be no question that the purpose of Section 402 (c) is to prevent property which has been disposed of by a quasi-testamentary transfer from escaping taxation and to make the law equally applicable to all decedents who make benefactions which are intended to confer no benefit upon the donees until after the death of the donors. Such has been the construction placed upon similar State statutes. *State Street Trust Company* v. *Treasurer,* 209 Mass. 373; *People* v. *Danks,* 289 Ill. 542; *Cole* v. *Nickel,* 43 Nev. 12; *State* v. *Pabst,* 139 Wis. 561.

That this is also the proper construction of the Federal Estate Tax Act is clearly indicated by the fact that the very section of that Act here under consideration couples both gifts in contemplation of death and gifts intended to take effect in possession or enjoyment at or after death.

That which differentiates an outright gift *inter vivos* which is not taxable from a quasi-testamentary gift, which is taxable, has been held to be not so much the form or succession of the donor's interest or title as the intention, purpose, and motive which prompts the gift. Intent is the sole criterion. If the gift was intended to benefit the

donee after the donor's death, as in this case, it is obviously similar in purpose and in effect to a testamentary disposition. *State Street Trust Company* v. *Treasurer, supra; In re Patterson's Estate,* 146 N. Y. App. Div. 286, aff. 204 N. Y. 677; *People* v. *Moir,* 207 Ill. 180; *In re Felton's Estate,* 176 Cal. 663.

The fact that the title to the property and the right to future enjoyment vest prior to death is immaterial. *Carter* v. *Bugbee,* 92 N. J. Law 390; *Re Cruger,* 54 N. Y. App. Div. 405, aff. 166 N. Y. 602; *Waugh's Appeal,* 78 Pa. 436; *People* v. *Kelley,* 218 Ill. 509; *Chambers* v. *Lamb,* 186 Cal. 261.

Moreover, as the court below pointed out, the interest of the beneficiaries involved in the instant case is not absolute, but is defeasible. *Wright* v. *Blakeslee,* 101 U. S. 174.

So far as this principle is concerned the present case is similar to that of *Keeney* v. *Comptroller,* 222 U. S. 525, the only distinction being that in the *Keeney case* a life interest was reserved to the donor, whereas in the instant case no interest is reserved. This difference is wholly immaterial, however, for the statute clearly looks, not to the interest which the donor reserves, but to the interest which he gives away. Otherwise, gifts in *contemplation* of death would not be included. The authorities quite generally hold that failure to reserve an interest does not indicate that the gift was not within the intent of the law. *New England Trust Company* v. *Abbott,* 205 Mass. 279;

State Street Trust Company v. *Treasurer*, 209 Mass. 373; *Re Patterson's Estate*, 146 N. Y., App. Div. 286, aff. 204 N. Y. 677; *Re Cruger*, 54 N. Y. App. Div. 405, aff. 166 N. Y. 602.

It will be observed that the construction by the State courts is the same in those States where the tax is imposed upon the right to transmit, as in New York (See *Home Trust Company* v. *Law*, 204 N. Y. App. Div. 590, aff. 236 N. Y. 607), as it is in those States where the tax is upon the right to receive, as in Massachusetts.

Furthermore, in construing Section 402 (c) it is to be noted that substantially the same language was contained in Section 202 (b) of the Revenue Act of 1916 (39 Stat. 756, Ch. 463). Prior to the passage of the 1918 Act this section in the 1916 Act had been construed by the Treasury Department as embracing such trusts as the one here involved. See Regulations 37, Article 24. In reenacting this previous provision in a later act without substantial change it must be deemed that Congress adopted that construction.

For the foregoing reasons, it is submitted that the rulings of the lower courts are correct.

II

There is no need for the issuance of the writ

The intent of the law is plain and no conflict of opinions in its interpretation is involved. The question, while important, perhaps, to petitioners,

is not of such general public importance as would bring it within the rules heretofore laid down by this Court for the issuance of writs of certiorari. *Fields* v. *United States,* 205 U. S. 292.

Therefore the petition should be denied.

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Assistant Attorney General.

SEWALL KEY,
Attorney.

AUGUST, 1925.

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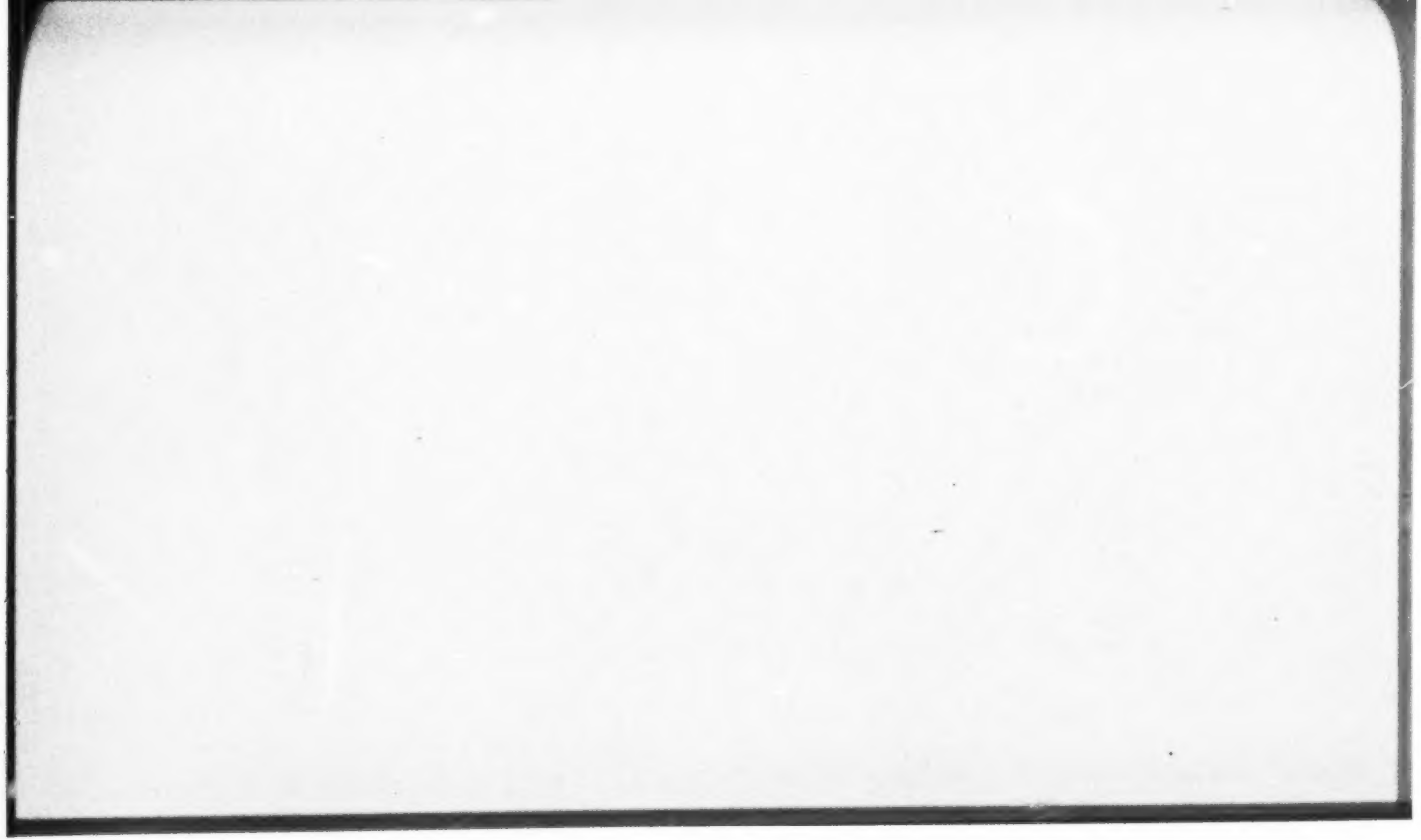

In the Supreme Court of the United States

OCTOBER TERM, 1926

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, Executrices of the Estate of Gustave E. Shukert, Deceased, Petitioners

v.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE for the District of Nebraska

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS OF THE COURTS BELOW

The District Court, when directing a verdict, delivered an opinion (R. 117) which is reported in 300 Fed. 754. The opinion of the Circuit Court of Appeals (R. 123) is found in 6 F. (2d) 551.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 126) was entered May 15, 1925. Petition for certiorari was filed August 1, 1925, and granted October 19, 1925, pursuant to Section 240 of the

Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION

This case presents the question of the proper construction of Section 402 (c) of the Revenue Act of 1918, and more particularly turns upon the meaning of the phrase "intended to take effect in possession or enjoyment at or after death" as used in that section, and as applied to a trust created by Gustave E. Shukert in his lifetime, by which he parted with all interest in the property involved, but postponed all possession, use, or enjoyment by the beneficiaries of principal or income to a date which in the normal course of events would be, was intended to be, and as events turned out was, subsequent to his death.

STATEMENT

This action was instituted in the United States District Court for the District of Nebraska on February 26, 1924 (R. 1), by Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, deceased, as plaintiffs, against Arthur B. Allen, Collector of Internal Revenue for the District of Nebraska, to recover an additional Federal estate tax in the sum of $13,685.47, with interest thereon, alleged to have been erroneously assessed and collected as a Federal estate tax imposed upon the transfer of the net estate of Gustave E. Shukert under the Revenue Act of 1918. The case was tried before a jury

(R. 13) and the court directed a verdict in favor of defendant below (R. 119), and upon the verdict judgment was entered. (R. 14.) The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 127.)

From the evidence in this case it appears that Gustave E. Shukert died testate on September 29, 1921, at Omaha, Nebraska. (R. 35.) Shortly prior to May 5, 1921, he sold a piece of real estate for the sum of $225,000; $35,000 of the purchase price was paid in cash. The balance of $190,000 was secured by a mortgage and was evidenced by ten notes payable, respectively, in one, two, three, four, five, six, seven, eight, nine, and ten years, each for $5,000, and one for $140,000 payable in thirty years. (R. 43.)

On May 5, 1921, Mr. Shukert transferred the proceeds of this sale to the United States Trust Company in trust for the following purposes (R. 22):

> 1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty ($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written

consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. * * *

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February first, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above-named children of the Founder shall die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issues shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above-named beneficiaries shall die without issue before the

> termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita.

It appears from the evidence that at the time this trust was created Mr. Shukert had a life expectancy of about seventeen years. It also appears that he did not expect to be alive at the time the beneficiaries came into possession and enjoyment of the trust property. (R. 40, 46, 47, 48, 64, 105, 106, 69.)

This evidence also shows that Mr. Shukert intended that the possession and enjoyment of the corpus and accumulated income of this trust fund should not come into the possession and enjoyment of the beneficiaries until after his death.

In making the return required by the Federal Estate Tax Act the executors did not include the value of the securities transferred to the trust in decedent's gross estate. (R. 2, 70.) Upon review and reaudit the Commissioner of Internal Revenue determined that this value was a part of the gross estate and thereupon increased the gross estate by the value of the said securities, that is by $225,000, and assessed an additional tax amounting to $13,685.47 by reason of this increase. (R. 99.) The executors paid the additional tax under protest and brought this suit to recover. (R. 5.)

STATUTES

The Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1097, provides, so far as applicable to this case, as follows:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

SUMMARY OF THE ARGUMENT

The intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate, the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testamentary. The trust in this case is in substance and effect testamentary because it postpones the ordinary incidents of ownership

until the donor's death, and, in fact is, and was intended to be, a post-mortem disposition of property.

The case differs from *Nichols* v. *Coolidge,* recently argued in this Court, in several respects which emphasizes the testamentary character of the gift involved in this case.

1. No constitutional objection to the Government's construction is urged in this case by the petitioners.

2. The donor in this case expressed his testamentary intent not only by the form of his gift but also by his declarations.

3. The beneficiaries in this case had no enjoyment whatever of either the income or corpus of the gift during the donor's lifetime.

4. In this case not only was the possession and enjoyment of both corpus and income postponed, but also the beneficiaries could not be ascertained until after the donor's death, and, therefore, the gift was not completed before death.

5. The time of enjoyment and possession was fixed in this case with reference to the donor's death not as the limitation of a preceding estate but in aid of the testamentary plan of the donor.

The cases relied upon by the petitioners do not sustain their position because the facts giving rise to those cases are different in almost every respect from the facts involved in the case at bar and because those cases do not call for an application of the principle contended for by the Government

in the case at bar. On the other hand, those cases which are similar on the facts to the case at bar fully sustain the Government's position.

ARGUMENT

The petitioners predicate their construction of Section 402 (c) upon the nature and purpose of the Federal Estate Tax Act. This matter was discussed, from the Government's viewpoint, in the case of *Nichols* v. *Coolidge,* recently argued in this Court. (No. 88, October Term, 1926, argued January 6th and 7th, 1927.) It was there urged that the tax was imposed upon the transfer of a decedent's net estate, and, therefore, upon the transfer at death of the decedent's own property, and not upon those transfers completed prior to death by gifts *inter vivos* or other means. Also that the property, the transfer of which gives rise to the tax, is the decedent's own property, and, therefore, not the property valued for the purpose of determining the value of the gross estate. The transfers and property included by Congress in the valuation of the gross estate were so included in order that the measure of the tax should operate in such a way not only that tax evasions might be prevented, but also that an equal tax burden should be imposed upon those who dispose of their property by will or intestacy and those who accomplish the same end, namely, the conferring of a benefit at death, by other means such as trusts which deprive the beneficiary of the

possession or enjoyment of the subject matter of the gift until the donor dies.

The instant case differs from the *Coolidge Case* in the following respects:

1. In this case the decedent died September 29, 1921, and the tax was imposed by and under the Revenue Act of 1918. (Ch. 18, 40 Stat. 1057.) The trust was created on May 5, 1921, while the Revenue Act of 1918 was in effect. There is, therefore, no occasion to apply or construe the provision of Section 402 (c) so that it shall apply to trusts made before the passage of the Act and the case presents no constitutional question resulting from retroactive application.

2. In the *Coolidge Case* the testamentary character of the gift (we are referring to the trust, not to the conveyance of real estate involved in that case) must be determined solely from its terms which postponed the beneficiaries' enjoyment until the donor's death. In the instant case the testamentary character of the gift is emphasized to the point of certainty by the declarations and expressed intention of the founder. These declarations of testamentary intention as disclosed by the evidence are quoted in the Appendix to this brief. In substance they show that the founder created this trust for the sole purpose of making provision for his family after his death.

3. In the *Coolidge Case* (again referring to the trust, not to the conveyance of real estate) there were

two gifts, one of the corpus to come into the possession of the beneficiaries at or after the founder's death, the other a present gift of the income from that corpus during the founder's lifetime. Considering the two gifts involved in the Coolidge Trust as one, the effect of the transaction was to give the beneficiaries a very limited partial enjoyment of the corpus during the founder's lifetime, with full possession and enjoyment vested at or after the founder's death. In the instant case there is but one gift, intended to confer no benefit, possession, or enjoyment until after the founder dies. Possession and enjoyment of both the income and the corpus is postponed, and the purpose of the postponement is expressly stated by the founder to be a purpose to make a gift after death.

4. The *Coolidge Case* presented the question whether it was the intention of Congress to include those trusts under which all interest in the trust property passed out of the founder before his death. The Government there contended and here contends that the reservation of an interest in the trust property is not the criterion set by Congress because it said that the interest *transferred* shall be included in the gross estate, and this is the antithesis of saying (as it might easily have said if it so intended) that where the founder retains an interest in the trust property it shall be included in the gross estate. If the Government is correct in this contention it is decisive of the instant case, for

here there was *no* enjoyment or possession of either income or corpus until after the founder died.

The answer to the question propounded by the Coolidge Trust, if adverse to the Government's contention, does not, however, decide the instant case. There is, in the instant case, no present gift. Not only are the beneficiaries expressly prevented from using, controlling, and disposing of the property and its earnings, but also in the normal course of events the beneficiaries could not be ascertained until after the founder's death. This is relied upon by the court below, and is hardly disputed in the petitioner's brief. He contends that there is a vested interest on the theory that "there is a present right to a future possession." (Petitioners' brief, p. 34.) But even if there is such a present right (and clearly there is not), it could not be contended that a person whose "present right to a future possession" is defeated so that neither he nor any of his heirs ever has the use, possession, benefit or disposal or control of the property or its earnings, ever takes the property or benefits by the supposed gift. The gift is not, and is not intended to be, complete until after the donor's death.

Wright v. *Blakeslee,* 101 U. S. 174.
Mason v. *Sargent,* 104 U. S. 689.
Clapp v. *Mason,* 94 U. S. 589.

5. The final distinction between the instant case and the *Coolidge Case* is found in the fact that the Coolidge Trust is by its terms to terminate at or

after the founder's death, while in the instant case evidence outside the instrument is necessary to show that the date fixed for distribution was selected because it was after the founder's death, and that the founder intended the trust to take effect in possession or enjoyment at or after his death. In this respect the instant case is similar to the case of *Armstrong, Admr.* v. *State,* 72 Ind. App. 303, and *Matter of Schmidlapp,* 236 N. Y. 278, in which cases it is held that if the facts and circumstances shown by the evidence reasonably authorize the inference that in fixing the date of distribution the grantor contemplated that his death would occur on or before the date named, the transfer is one intended to take effect in possession or enjoyment at or after death if the other characteristics of such a transfer appear.

In this case the evidence is clear that the donor intended to postpone the possession and enjoyment until after his death. The District Court found undisputed evidence of this intention. (R. 119.) The Circuit Court of Appeals expressly affirmed this finding (R. 125), and the petitioners do not dispute it.

The important feature of the selection of a day certain for the termination of this trust is that it discloses that the purpose of the founder was testamentary. The trust was terminated not as a limitation upon an estate preceding the beneficiaries' enjoyment, but in furtherance of Mr. Shukert's testa-

mentary plan. That plan, as he stated it, was that his death should leave his family in control and possession of a part only of his property. The balance, viz., the trust property, was to come to them in their old age to protect them from the result of a possible injudicious use of that property given to them at death. The plan is clear. It is laudable. It is wise. It assures the consummation of Mr. Shukert's purpose as no will, which might be contested, could do. But it is testamentary in its scope and purpose, and for this reason, not because there is any evasion, or attempted evasion of tax, it is within the Statute.

The petitioner's position is stated in his brief at Page 19 as follows:

> We contend that Sec. 402 (c), relating to transfers intended to take effect in possession or enjoyment, etc., should be construed to define this class of transfers exclusively,—that is, transfers wherein possession or enjoyment is retained by the grantor until his death. * * *

So limited, the Statute does not accomplish either its purpose to equalize taxes or to prevent evasions. Manifestly the device adopted by this decedent would be adopted by many men as an easy means of avoiding the tax. That property which they do not need for their use will be placed in the custody of trustees and allowed to accumulate for the benefit of their heirs. So far as the heirs are concerned, and so far as the donor is concerned, such an ar-

rangement differs but little in theory, and not at all in practice, from the case in which the property remains in the custody of the donor himself accumulating earnings for the benefit of the donor's heirs.

However, as pointed out in the *Coolidge Case,* the State courts have consistently held that trusts of this general nature, namely, those in which the founder reserves no interest to himself, are within the phrase "intended to take effect in possession or enjoyment at or after death" if the corpus is distributable at or after the founder's death.

The cases cited by the petitioners to sustain their contention are entirely different on their facts from the case at bar. They fall into two general classes. First, those in which the donor received, in fact or in effect, the income from the property during his life. Such cases are within the Statute for two reasons. As stated by the Circuit Court of Appeals for the Third Circuit in *McCaughn* v. *Girard Trust Company,* 11 F. (2d) 520, the first reason is because the exclusive possession or enjoyment is in the donor for life, and the second equally efficacious reason is because the donor intended and provided that so far as the donee's possession and enjoyment was concerned the gift should not take effect until after the death of the donor. The postponement of the donee's possession and enjoyment is such a postponement of the ordinary incidents of ownership as to make it a

post-mortem disposition of property, and, therefore, it is not only within the letter but also within the spirit, intent, and purpose of the Act. (11 F. (2d) 521.)

The second class of cases referred to by the petitioners consists of those in which the termination of the trust and distribution of the corpus do not happen at or after the *decedent's* death, but at or after some third person's death. In other words these cases concern trusts which provide for the payment of an income to the beneficiary for the beneficiary's life, and a distribution at or after that beneficiary's death. The following cases cited by the petitioners fall within this class:

Dolan's Estate, 279 Pa. 582.

In re Cochrane's Estate, 117 Misc. Rep. 18, 190 N. Y. Supp. 895, affd. *per curiam* 202 App. Div. 751. 194 N. Y. Supp. 924.

People v. *Kelley,* 218 Ill. 509.

Dexter v. *Treasurer & Receiver General,* 243 Mass. 523.

In each of the foregoing cases, moreover, the court was not considering the question whether the remainder was within the statute but was considering the question whether the life estate should be taxed.

The case of *People* v. *Estate of Moir,* 207 Ill. 180, did not concern a trust, but was a case in which the donees were put into actual possession and enjoyment of the property.

The insurance cases are not analogous to the instant case because the beneficiary has immediately upon being named all the possession and enjoyment to which a life-insurance contract is susceptible.

The excerpt from the opinion in *Cochrane's Estate, supra,* quoted on page 25 of the petitioners' brief, is interesting because the learned Surrogate who is quoted is in entire disagreement with the Surrogate, presumably equally learned, who said in the case of *In re Patterson's Estate,* 127 N. Y. Supp. 284, 286:

> * * * I believe that the authorities sustain the proposition that a trust deed giving all the income of an estate to beneficiaries for the life of the grantor and the corpus at grantor's death, is, so far as the corpus is concerned, a transfer intended to take effect in possession and enjoyment at the death of grantor, and therefore taxable. In such a case the beneficiary possesses and enjoys the income during the life of the grantor, but possession and enjoyment of income is not possession and enjoyment of the principal which produces that income. It seems to me that the plain wording of the statute is enough to fix taxability upon the entire corpus of the property passing by this trust deed, even if the entire income derived therefrom had gone to the beneficiaries from and after the delivery of the deed, because, by the terms of the deed, the corpus was intended to pass into the possession and enjoyment of the beneficiaries at or after the death of the grantor.

Moreover the dictum in the *Cochrane Case* overlooks the rule previously announced by the Appellate Division in the case of *In re Cruger,* 54 App. Div. 405, 66 N. Y. Supp. 636, affirmed by the Court of Appeals in 166 N. Y. 602, and subsequently adhered to in the matter of *In re Dunlap's Estate,* 205 App. Div. 128, 199 N. Y. Supp. 147. The *Patterson Case* was affirmed by the Appellate Division, 146 App. Div. 286, 130 N. Y. Supp. 970, and per curiam by the Court of Appeals, 204 N. Y. 677.

This Court has said that the trusts under which the beneficiary comes into possession at the death of a third person are of a testamentary character, and that until the possession comes in the gift is not complete.

Scholey v. *Rew,* 23 Wall. 331.
Wright v. *Blakeslee,* 101 U. S. 174.
Clapp v. *Mason,* 94 U. S. 589.
Mason v. *Sargent,* 104 U. S. 689.

The instant case is much stronger, for here in the normal and expected course of events the beneficiary could not come into possession, could not use, and could not know that he would ever have the possession or use until after the founder of the trust dies. Until then all the ordinary incidents of ownership are postponed. There is no possession or enjoyment until after the death of the donor, but there is a post-mortem disposition of property. Such a transaction is testamentary in character, and therefore not only within the letter of the Act but also within its spirit and intent.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Eighth Circuit in this case should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
A. W. GREGG,
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THOMAS H. LEWIS, JR.,
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FEBRUARY, 1927.

APPENDIX

Mr. John H. Caldwell, a witness for the plaintiff and an officer of the United States Trust Company, testified that the reasons Mr. Shukert gave for creating this trust were (R. 40):

> He said this was an arrangement he made for the future of his family, I do recall that I said to him that it was a very large sum. I said to him at the time, I said, I hope you are not "trusting" your whole estate, and you do not want to tie up more than you can afford to. He said, oh no, I have much more than this, but this is something I am putting aside for the future of my family to see that they will never come to want. It is a provision I am making for them.

Mr. R. W. Harber, also a witness for the plaintiff, and the confidential adviser of Mr. Shukert in his lifetime, testified (R. 46):

> Q. Did he talk with you or consult with you about it?
>
> A. Yes, we discussed the terms, and I expressed surprise at the duration of it. That was a thirty-year period.
>
> Q. What did he say about that?
>
> A. Well, all that I recall now is that it was making provision for the family, and in no way affected his estate because he had such a large amount left and it would not interfere with any plans he had in mind for going ahead with other business arrangements.

On cross-examination Mr. Harber testified as follows (R. 47, 48):

> Q. You say you were surprised at the duration of this trust. I presume you mentioned it to Mr. Shukert?
>
> A. I did.
>
> Q. You doubtless told him that by the time the children came to the enjoyment of this property that he would be dead, or something of that kind?
>
> A. I said something about the age of the beneficiaries, and I may have said something about him being dead at the termination of the trust, but I do not recollect that, but I would not say I did not say it.
>
> Q. At any rate that was not a material point in creating the trust?
>
> A. No.
>
> Q. He did not expect to live for thirty years. That had not anything to do with the trust?
>
> A. I had no way of knowing of course, but I did not believe that he would live that long.
>
> Q. In fact, was his plan to make these trust provisions—to defer these trust provisions so that if his children should dissipate or lose the money which came from his estate, or from him, that they would in their middle life be taken care of by this trust fund?
>
> A. I suppose that was it.
>
> Q. Well, didn't he say that?
>
> A. Well, practically said that was what would happen.

Miss Isabel C. Shukert, one of the plaintiffs, testified (R. 64):

> Q. Did you talk about that thirty-year provision?
>
> A. Yes.

Q. What did he say about it?

A. I think his idea in making that——

Q. (Interrupting.) No, beg your pardon—what did he say about it?

A. So that we would have something in our old age.

Q. He said that he wanted you to have something in your old age?

A. Yes, and in connection with that he mentioned fortunes which had been squandered.

Mr. Cutler, a witness on behalf of the plaintiff and an officer of the Trust Company, testified (R. 102, 103):

A. Yes, those subjects quite often come up in such matters. I rather questioned Mr. Shukert's idea of leaving this amount of money tied up in such a manner for such a long term, which was thirty years. Mr. Shukert said that he was good for fifteen or twenty years and that in five or ten years he would be able to know more about the children's business ability and that Miss Isabel's business ability had been proven to him. As far as I knew he had entire confidence in her ability, but the younger daughter was in school and the boy was in the Omaha schools and the other daughter out of the city and he said that in five or ten years he would be able to get a better line on their business ability and at that time could make new arrangements if necessary.

Q. What did he say about the balance of his property—did you find out about the size of his estate in talking with him there?

A. I had a very good idea of the size of his estate.

Q. Now what was said about the placing of this in trust, whether the children would need these funds?

A. He said that he had plenty of money with which to take care of his children until that time, and I even had questioned why he, what he meant by that, and he said he could take care of them in the meantime and he would make provision so that in their old age they could have this to fall back on, provided that in the new arrangement they should dispose of all of it.

In cross-examination Mr. Cutler further testified (R. 105, 106):

A. Well, just when I questioned his idea of tying this up for thirty years.

Q. That was his idea—

A. (Interrupting.) He said, "I am good for fifteen or twenty years, so it doesn't make any difference; I can take care of them until that is up."

Q. I don't see how that has any bearing on the thirty-year provision?

A. My idea of that was that if he could take care of them for fifteen or twenty years that the estate that he would leave would surely cover the interim.

Q. He spoke of the fact that if they should dissipate the funds they would be cared for in their old age, didn't he?

A. Yes.

Q. In other words, he contemplated they would come into possession of his main fortune, and if they should dissipate that in their younger lives they would still have this?

A. If they should dissipate it between the time they came into possession of it and the end of the thirty years.

Q. That some time they would come into possession of his major estate, that is, the part he did not put into this trust?

A. The other funds.

Q. And that if they should mismanage and dissipate that large part of his fortune, still, in their old age, they would be taken care of by this trust fund?

A. Yes, sir.

Q. That is what he had in mind?

A. I think so.

Q. No doubt about that, is there?

A. Not in my mind.

The evidence of these witnesses is undisputed

○

SUPREME COURT OF THE UNITED STATES.

No. 193.—October Term, 1926.

Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, Deceased, Petitioners,
vs.
Arthur B. Allen, Collector of Internal Revenue for the District of Nebraska.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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56

[March 21, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of a federal estate tax paid by the plaintiffs, petitioners, under duress. The District Court directed a verdict for the defendant, the collector, 300 Fed. Rep. 754, the judgment upon which was affirmed by the Circuit Court of Appeals. 6 F. (2d) 551. A writ of certiorari was granted by this Court. 269 U. S. 543.

The tax was levied under the Revenue Act of 1918; February 24, 1919, c. 18, § 402(c); 40 Stat. 1057, 1097, which provides that the value of the gross estate of the decedent shall be determined by including all property "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death", &c. By § 401 the tax is laid upon the transfer of the net estate. The transfer taxed in this case was made by the testator on May 5, 1921, and was a conveyance to the United States Trust Company of Omaha of notes and bonds valued at $225,000, par, in trust to accumulate the income (subject to certain small deductions in case of the extreme destitution of the testator's wife or of any of the beneficiaries named) until February 1, 1951, unless the last of the beneficiaries should have died more than twenty-one years before that date, &c., and then to divide the principal and undistributed income among his three children by name. The

testator died on September 29, 1921, a few months after creating this trust, but it is not argued that he created it in contemplation of death as a device to escape taxes. The only question is whether the trust was one intended to take effect in possession or enjoyment after his death, as was ruled below.

The transfer was immediate and out and out, leaving no interest remaining in the testator. The trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the Circuit Court of Appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust. See Gray, The Rule Against Perpetuities, § 108(3). It seems plain from the little evidence that was put in that the testator was not acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that being fifty-six years old, if he thought about it, he would have contemplated the possibility or probability of his being dead before the emergency might arise. Of course it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute. There certainly is no transfer taking effect after his death to be taxed under § 401.

It is not necessary to consider whether the petitioner goes too far in contending that § 402(c) should be construed to refer only to transfers of property the possession or enjoyment of which does not pass from the grantor until his death. But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.